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Montana Constitutional Convention Studies

MONTANA CONSTITUTIONAL CONVENTION · 1971 - 1972 ·
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FOR THE PEOPLE

Bill of Rights

Prepared By:
Montana Constitutional Convention Commission

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MONTANA CONSTITUTIONAL CONVENTION

1971-1972

BILL OF RIGHTS

By RICK APPLEGATE

CONSTITUTIONAL CONVENTION STUDY NO. 10

PREPARED BY

MONTANA CONSTITUTIONAL CONVENTION COMMISSION

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The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention. This series of reports by the Commission is in fulfillment of that responsibility.

This study on the bill of rights was written by Rick Applegate, research analyst on the Commission staff. The Commission has authorized publication of the report as approved by the Research Subcommittee on the Bill of Rights consisting of Eugene H. Mahoney, Thompson Falls, chairman; Arthur C. Hagenston, Glendive; R. H. "Ty" Robinson, Missoula, and Leonard A. Schulz, Dillon. This report concerns not only a study of the Declaration of Rights in the present Montana Constitution but also an exploration of current civil liberties questions.

The Commission extends its appreciation to those who aided in the preparation of the study. This report is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

Our greatest present disloyalty to the Constitution lies in the fact that we do not study and criticize it as did the men who devised and adopted it. They met novel and desperate situations by establishing unheard-of and revolutionary forms of government. We too are facing novel and desperate situations. Shall we do as they did, or shall we hate and fear those who follow their example? In the practical answering of that question it will be revealed whether the American experiment in freedom is still going on or has already been abandoned.

Alexander Meiklejohn

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SUMMARY

CHAPTER I

INTRODUCTION

At the outset it should be made clear that a summary cannot ordinarily accomplish what an entire report intends; this is especially true in this case. The report which follows is itself only an exploration of the multitude of questions in the civil liberties field. As noted in Chapter I, the report is not and could not be definitive. Chapter I also contrasts the tone of necessity accompanying the adoption of the federal Bill of Rights with the widely noted apathy that is behind much of the civil liberties debate today. However, increasing pressure from all corners of the society makes the area and its issues challenging.

CHAPTER II

HISTORICAL BACKDROP

This chapter is a brief essay on some of the historical roots of the constitutional guarantees of civil liberty. Unfortunately, the essay concentrates on the documentary and conceptual aspects of this history to the detriment of the political climate, configurations and attitudes that always underlie the form in which the guarantees appear on paper. Much of the political quality of the civil liberties area--for example, the fact that the initial step in the recognition of certain guarantees was often with minorities and political outsiders--is lost thereby.

Mention is made of two of the timeless principles from classical antiquity that surfaced in the colonial period's surge of bill of rights drafting: the notion that law needs an external legitimation--that it is not obligatory merely because it is law--and that the source of the legitimacy is the intuitive common sense of all men, rather than the special province of an elite or a class. Two early English documents--especially the Magna Carta--are discussed as an effort to subject the rulers to the law as enacted. Some sense of the shape of colonial concern in certain rights areas can be gleaned from the section describing the rights provisions of early colonial charters and enactments. The most fertile period

of civil liberties enactments--a period primarily important for the growth of a genuinely public spirit--was the revolutionary period. During this period leading up to the split with Great Britain, the colonists responded to various denials of the rights of Englishmen with a number of colonial and federal statements of civil liberties.

The main impetus for guaranteeing civil liberties during this time rested with the states. It was not until after the break with England, when certain anti-Federalists became concerned with what they felt was an intolerable concentration of power in the newly created central government, that clamor rose for a federal Bill of Rights. The 1787 U.S. Constitution was drafted to strengthen the weak national government created by the Articles of Confederation. In order to secure ratification of the Constitution, several state conventions had to recommend civil liberties provisions to be appended to the document. When the first Congress met, James Madison pushed a list of proposals that eventually became the first ten amendments to the Constitution--the Bill of Rights. It is noted that Madison understood this list to be only a distillation of rights ideas from the various state declarations and not a full-blown federal commitment to civil liberties questions. In part to keep the federal government from assuming that specifically enumerated rights were the only ones that needed to be respected, Madison included a provision announcing that there were other rights not enumerated which the newly created government was bound to respect.

This chapter concludes with a brief note on the nearly verbatim adoption of the Colorado Declaration of Rights into the 1889 Montana Constitution. The few cases where there was a departure from the Colorado wording are analyzed in the body of the report.

CHAPTER III

ARE STATES' BILLS OF RIGHTS NECESSARY?

This chapter explores the contemporary function of state declarations of rights. Although it does not appear to be seriously alleged anywhere that state declarations of rights are valueless, there are several considerations that bear on the necessity and potential of state activity in the civil liberties area. First, there is little chance that a political society, no matter how committed to the principle of

popular sovereignty, would be well served by aborting vigorous efforts at all levels of government to insure, on the one hand, that individuals and associations are protected from governmental abuse and, on the other hand, that minorities are protected from the unchecked power of majorities. These are the two main functions that written declarations of rights were drafted to perform, for there are serious and complex legal and political problems in the civil liberties field which probably could not be handled without specific safeguards to guide the resolution of the rights questions which arise.

There is some uneasiness about the current ascendancy of the federal government in the civil liberties area. On the one hand there are those who contend that in doing so, the federal government has usurped functions that properly belong to the states. They can cite impressive history to back up their contentions that the states should be the prime guarantors of civil liberties. On the other hand there are those who allege that it was the failure of the states to exercise this function satisfactorily that made it imperative that the federal government intervene in the first place. These commentators do not deny that the states could and should have the primary role in protecting civil liberties; rather, they contend that there was no state function to usurp at the time the federal government stepped in.

The main vehicle by which the federal government has set minimum standards with which the states must comply in civil liberties safeguards is the Fourteenth Amendment. This amendment, passed after the Civil War, guarantees to state citizens "due process of law," all the privileges and immunities of citizenship and the "equal protection of the laws." Under these clauses, the federal judiciary has, over the years, accomplished a halting and as yet incomplete extension of the federal Bill of Rights guarantees to state behavior. The fact that not all the federal provisions are binding on the states and that the federal ascendancy is never definitive for all time indicates the danger of assuming that citizens are adequately protected by the provisions of the federal Bill of Rights.

Whatever the extent of the federal dominance in the civil liberties field, it is important to remember that the federally enunciated standards are only minimum safeguards. The states are free--and have been encouraged by the U.S. Supreme Court--to go beyond the federal standards at any point where it is believed that citizens might better be protected.

Coupling the historical fact that Madison, in drafting the federal guarantees, did not intend to supplant the pre-existing

state guarantees--he borrowed heavily from them in distilling what became the federal Bill--with the contention that modern society demands greater civil liberties protection than the relatively unindustrialized eighteenth century American colonies, the potential for vigorous state action becomes a bit clearer. Perhaps it is true that the contemporary period requires more than the admirable list of protections drafted for colonial America. If so, the states could function to test a number of potential new rights--a function quite difficult, if not impossible, at the federal level. States could set examples for each other and for the federal government by testing these rights in their smaller jurisdictions without having to set in motion the somewhat unwieldy and awesome federal amendment procedures. In this way, the states could fulfill a function that they lost over time: the vigorous enforcement and extension of safeguards of civil liberty.

One final concern is the at once compelling and dubious contention that state constitutions ought to be short in the interests of clarity and conciseness. A sensible and seemingly self-evident suggestion such as this, however, is not without costs and even dangers, especially in the area of civil liberties. A sound declaration of rights is not necessarily short, nor should its provisions all be approximately the same number of words.

CHAPTER IV

PREAMBLE AND POLITICAL THEORY PROVISIONS

Chapter IV indicates the timeless and fundamental nature of the principles of democratic political theory, principles whose language and meaning derive not only from the period of the American revolution but from political literature from the classics to the contemporary revival of political theory and discourse. The background and potential of the introductory statement to the constitution--the preamble--as a kind of announcement of the positive goals of government is discussed. In examining the political theory provisions and concepts, special consideration is given to the colonial understanding of the principles and the contemporary reassessment of the meaning and significance of the principles of democratic theory; this is in response to the commonplace axiom (almost without exception) that the best, most valuable thinking on political questions occurs in periods of social and political stress.

SUMMARY

The arguments on the question of including statements of political theory in state fundamental law are considered. To the assertion that the declaration of rights ought to contain only judicially enforceable rights, it is answered that declarations do not exist merely to announce rights which the judiciary can protect; it is said that the function of a declaration of rights is also to announce in broad and theoretical terms the principles upon which government functions. This section is followed by brief discussions of the following principles of political theory: the purpose of government, the principle of popular sovereignty, the inalienable rights, consent of the governed, the principle of free and open elections, separation of powers and the various provisions asserting civilian control of the military. Each of the concepts is treated as a timeless principle of the sort which has informed political assessments, actions and structure across history.

CHAPTER V

RIGHTS OF EXPRESSION AND SUBSTANCE

This chapter deals with three issue-areas related to the freedom of expression. The first, the right of association, has a long history in the writings of political theory and was announced nearly fifteen years ago by the U.S. Supreme Court to be a fundamental right. The right of association is an example of rights which are designed not to protect groups with which the majority agrees easily, but to protect those which are associated in politically dissident minorities. The fact that historically the church, unions and civil rights groups were all such politically dissident--and disparaged--minorities indicates the necessity of such a right.

The political loyalty oath has been popular and widespread for a number of centuries. In recent times it has come under scrutiny as to its efficacy and, more important, for its potential dampening effect on the critical inquiry essential to an open society. The recent court analysis of such oaths, the Montana experience with them and the analysis of oaths by political philosophers are explored. An indication of the current activity in the area of political loyalty oaths--apart from the recent activity in the Montana legislature--is a court ruling handed down as this report went to print that the Montana teacher's loyalty oath is unconstitutional.

SUMMARY

A fairly recent area of heightened concern--closely allied with the value of a free and critical press--is the question of the openness of state government operations, the citizen's right to know. An old principle of democratic theory--one which still is relevant in that it speaks to a contemporary problem of some magnitude--is that the activities of government should be public and that the citizen should not be hindered in his efforts to scrutinize governmental operations. This problem probably has become more acute in part because of the increasing complexity of government at all levels. But the main reason for recent statutory activity in this area is the propensity of administrative agencies to refuse to disclose some of their activities for a variety of reasons, not all of which are consistent with the right to know. The federal and Montana statutory activities and their limitations are explored, together with the potential of a broad disclosure-oriented state constitutional provision.

The final right discussed has been the subject of heated, if not altogether informed, controversy over the past few years. The right to bear arms announced in an effort to prohibit the king from disarming Protestants in the seventeenth century is protected in the Montana Constitution in strong wording. Although such a provision probably restricts the types of legislation which can be passed by the state legislature regulating firearms, it does not and, because of the supremacy clause of the U.S. Constitution, cannot limit the similar powers of the federal government.

CHAPTER VI

PROCEDURAL RIGHTS AND ISSUES

This chapter deals with the broad principles and specific rights designed to protect the individual in various stages of procedure against him, usually legal procedure based on criminal accusation. In fact, it can be said that the establishment of the procedural safeguards discussed here laid the groundwork for the ideal of an accusatorial system of justice which presumes that the accused is innocent and places the burden of proof on his accusers. It is noted that although the common assumption is that substantive rights of, say, expression and assembly are most fundamental, they would be virtually useless without the existence of a known and fair system of adjudication for breaches of the law. Among the major principles of procedural fairness discussed are due process of law, the writ of habeas corpus, the right against self-incrimination and the protection against being twice

placed in jeopardy for the same alleged offense. Other procedural rights found in the Montana Constitution include the right to be free from excessive bail and unreasonable detention, the right to a speedy and public remedy, the right to be tried by a jury, the right to be represented by counsel or to represent one's self, the right to confront and cross-examine one's accusers, and the right to have processes for compelling the attendance of witnesses on a defendant's behalf. All these provisions are valuable insofar as they maintain the accusatorial nature of the trial process and redress the disparity between the resources of the government, which prosecutes, and of the defendant.

In addition to these brief discussions of the fundamental procedural rights, three other rights areas which have procedural as well as substantive implications are explored. The first deals with the problem of incarceration in the system of criminal justice. Subjects for consideration in this area include the substantive and procedural rights of persons incarcerated, the restoration of any substantive or procedural rights denied upon conviction or incarceration and the capital punishment controversy. Perhaps the only way to deal with the rights of persons incarcerated is to review the written and unwritten regulations of institutions to which persons are sentenced or committed to see if there exist denials of civil liberties not necessitated by incarceration. Specifically on the questions of restoring rights to felons after completion of sentence, a review of the unclear statutes and Board of Pardons procedure may be in order. The capital punishment question deserves consideration beyond the brief treatment it receives here. The contemporary trend toward its abolition is indicated by the fact that Montana and a number of other states, while still having it on the statute books, have not used it for a number of years.

A second issue-area dealt with is the problem of extending fundamental civil liberties safeguards to cover administrative hearings and legislative investigations. Concern in this area is in response to the increasing size and potential for abuse of discretion of bureaucracies within the executive branch of state government. Several possible constitutional provisions are discussed in this connection.

The final area discussed is the emerging trend toward safeguarding substantive and procedural rights against abuse by private centers of power. The first constitutional example of this type of provision was the federal Thirteenth Amendment, which prohibited private persons from having slaves as property. Beyond that, the notion that enunciated rights should protect citizens from all centers of power is quite old. Recent activity in the area

has centered around the federal government and the rights of members to adequate representation in democratic unions. With the increasing number and import of contacts that citizens have with large private institutions--union and corporate--the safeguards of civil liberties against private power may become most important in civil liberties activity in the near future.

CHAPTER VII

PRIVACY AND ITS INVASION

Increasing concern is evident over the sphere of citizen privacy and the potential of a highly developed society for invading it. Central to this issue is the traditional constitutional protection against unreasonable searches and seizures, which was especially advocated in the colonial period in the face of the British practice of invading colonists' homes with general warrants to search for goods which violated British trade acts. The U.S. Supreme Court, in interpreting the federal Fourth Amendment--which prohibits unreasonable searches and seizures--has announced that information or items seized in an unreasonable search and seizure are not admissible as evidence in a trial. The requirement that probable cause be established prior to obtaining a search warrant is briefly discussed here, as are the application of the search and seizure provisions to civil and administrative proceedings and the police practice of "stop and frisk." An indication of the kinds of rulings that the Montana Supreme Court has handed down on searches and seizures also is offered.

One of the most pressing problems in the contemporary privacy situation is the high potential for abuse of wiretapping and electronic surveillance. The U.S. Supreme Court has demonstrated the complexity of the problem by changing its stand more than once on various interceptions of private communication. The court opinions and their dissents over a period of forty years provide a good background for the communications interception debate. Two federal statutes--the Communications Act of 1935 and the Omnibus Crime Control and Safe Streets Act of 1968--also reflect an effort to balance the federal prosecution of crime with the fundamental right of privacy. Only recently has there been pressure to permit state officials to obtain wiretap authorization. This proposed extension is a civil liberties issue of some magnitude; as many commentators have argued, there is great potential for abuse of such authority by state officials. Several alternatives for state constitu-

tional activity in the area are discussed. Of paramount importance prior to establishing wiretap authority is establishing that there are certain and compelling reasons for Montana officials to obtain such authority and that they would use it consistent with constitutional rights.

To facilitate primarily the judicial wrestling with privacy questions, various suggestions have been made concerning a broad statement of the right of privacy at the level of the state constitution. The right to be free from politics is perhaps the oldest and most significant right of western civilization. Since a famous essay written by Samuel Warren and Louis Brandeis near the turn of the century, there has been much activity in this area. More than half of the states have recognized the right of privacy--Montana is one--and in 1965 the U.S. Supreme Court announced the right as being fundamental. Various alternatives for a right of privacy provision are discussed.

CHAPTER VIII

ENVIRONMENTAL PROTECTION

This chapter concerns the potential for constitutional statements relating to protecting the quality of the environment. Four main areas are explored: the right to a healthful, unsullied environment; the alternatives for enforcement of such a right, and two closely associated principles, the power and rights associated with eminent domain proceedings and the potential of the public trust doctrine as a blanket protection against abuse of the environment.

The right to a healthful, unsullied environment is an increasingly common state constitutional provision. The scope of such a right is indicated by a discussion of the effort to derive it from the existing federal Bill of Rights. Various wordings for such a provision are discussed.

It also is noted that by itself the enunciation of the right to a healthful, unsullied environment would not amount to much unless it was made clear who was bound by the right and unless there was some explicit delegation of enforcement power.

Several alternatives exist for the enforcement of environmental bill of rights provisions. One increasingly employed by nearly every legislature in the country with varying degrees of commitment and success is simply to enact statutes to protect the environment. But there is much concern in recent times that

this approach to environmental protection does not have as much direct impact as it might because of increased administrative discretion. In fact, the concern over abuses of discretion by administrative agencies--removed from public scrutiny--is not confined to environmental issues, but is a crucial problem for administrative law in general. Two responses are increasingly common to this problem. One is the creation of administrative agencies--sometimes with ombudsman-type powers of intervention and enforcement--whose sole function is to protect environmental quality. Montana has created such an agency with recommendatory and impact-assessment powers. Another response has been to supplement the legislative and administrative powers of dealing with issues of environmental importance by granting citizens the right to sue governmental agencies and private concerns to enforce state environmental quality policies. This supplemental citizen enforcement power is being adopted by a steadily increasing number of states. Some of the arguments surrounding its efficacy are discussed in this chapter, and it is noted that the enunciation of an environmental right and citizen enforcement powers would necessitate some statutory embellishment in order to supplement whatever broad statements might be placed in the constitution. This is true of a number of other rights areas where there is the possibility of including a broad statement of intent and direction in the constitution. The question is not whether the issues are statutory or constitutional; clearly they are both. The constitutional law announces the fundamental intent; the statutory provisions add details in compliance with the constitutional expression.

The state's power and the private rights associated with eminent domain are a virtually undigestible body of law; constitutional history of public uses for eminent domain purposes and increasing concerns about the environmental impact of eminent domain activities are discussed in this chapter. It is noted that the delegates to the 1889 Constitutional Convention were not at all clear that what they were calling public uses were really public; this suggests a review of the activities classified as public by the Constitution and by later statutes might be in order.

Several principles within the concept of eminent domain are suggested as mitigating influences on the adverse environmental impact of many eminent domain actions. One of these, the public trust doctrine, is stated in indirect form in the present Montana Constitution; it potentially is the broadest form of constitutional protection of the environment. The essence of the doctrine is creation of a trust-beneficiary relationship, with the environment being the trust and the

public the beneficiary. The environmental trust is administered by the state to insure the continued quality of the trust in perpetuity. The public, as beneficiary, is accorded the right of protecting its interest in the trust.

The public trust doctrine operates on the same principle as the power of eminent domain; it announces that there are paramount considerations which can override private property rights in case of environmental abuse. The power of eminent domain is the long-recognized power of the state to override private interests--with just compensation provided in advance--for public necessity. What the public trust doctrine amounts to, then, is an extension of eminent domain-type governmental powers and public rights to the protection of the environment. In the case of both, the rights issues involve a proper balancing of the public good with the property rights of private individuals.

The chapter concludes with a warning that there are no easy or final solutions to the crisis of deteriorating environmental quality. In a society which has yet to seriously consider restricting economic growth, it is inevitable that the choices will be difficult and the contradictions appear unyielding.

CHAPTER IX

MISCELLANEOUS PROVISIONS

This chapter discusses three well-established provisions in American constitutional history: the unenumerated rights doctrine, provisions on treason and the prohibitions on debt imprisonment. The unenumerated rights provisions found in the federal Bill of Rights and the Montana Declaration of Rights originally were drawn to keep the specific list of civil liberties safeguards from becoming final; that is, a conscious effort was made to announce that there were rights that governments were bound to respect beyond those specifically enumerated in bills of rights. This principle, virtually ignored for some time, finally is becoming the main impetus in the recognition of new rights.

A brief discussion of the provisions prohibiting debt imprisonment emphasizes the potential constitutional alternatives to the current Montana provisions. Perhaps the most widely used alternative exempts a certain amount of a debtor's property so that he may retain the necessities of life in the face of debt action.

SUMMARY

Treason provisions were incorporated in various constitutions with a view to severely restrict the use of criminal prosecutions for treason to dampen political dissidence. The colonists were well aware of the abusive potential of accusations of treason; their concern is reflected by the fact that state constitutions contain nearly verbatim wordings on the subject.

One other area of consideration is sovereign immunity. The basic question in this area is should the state be able to claim sovereign immunity and thereby halt suits against it for negligence or other torts? Does the doctrine of sovereign immunity mitigate against the constitutional principle that there should be a judicial remedy for all injuries of person and property? Is the current Montana statute limiting actions against the state to the amount of insurance coverage ill-advised in the sense that it does not compel state agencies to carry any more insurance than they deem necessary?

CHAPTER X

NEW PROVISIONS

This chapter discusses three potential rights issues on which the Montana Constitution now is silent. The first of these is a relatively new area, the rights of persons under the age of majority. There has been considerable activity in this field, mainly concerned with the procedural rights accorded young people in juvenile courts. But the increased court and statutory activity has not changed the fact that there are not even the broad outlines of types of rights young people possess. Young persons are not guaranteed even the procedural rights which are deemed fundamental to a person accused of a criminal act. Several constitutional provisions--the products of efforts by a number of Montana groups concerned with the issue--are discussed in this chapter.

The second area considered is one that has been a continuing civil liberties preoccupation since the beginnings of the American republic. The Montana Constitution currently contains no provisions on equal protection of the laws or the freedom from discrimination; it does contain two provisions of doubtful necessity, the rights of aliens and the protection against involuntary servitude. These two provisions are discussed briefly in relation to equal protection of the laws and the freedom from discrimination.

State constitutional provisions on equal protection of the laws are only an affirmation of the federal Fourteenth Amendment; that amendment binds the states to guarantee equal protection of the laws to all. A potentially broader application of the equal protection principle could be obtained if the state constitution specified some areas apparently not covered by the federal Fourteenth Amendment--for example, that equal protection of the laws should not be denied on account of sex or status of income. Such a protection afforded to all regardless of sex would anticipate the federal Equal Rights Amendment, currently bottled up in Congress. Announcement of equal protection regardless of income status would be a step toward providing that a person would have adequate procedural rights amenities regardless of income.

Of even greater potential are the alternatives for guaranteeing freedom from discrimination. Various constitutional alternatives are discussed, perhaps the strongest of which is a guarantee that one who believes he is being discriminated against has the right to enjoin the discriminatory practice.

CHAPTER XI

CONTEMPORARY CONCERNS AND THE BILL OF RIGHTS

This chapter indicates the potential rights issues within two broad areas of contemporary concern: population growth limitation and access to social services, particularly the necessities of life. These areas increasingly have been the subject of discussion in the literature on civil liberties in recent years; both have direct relevance to traditional conceptions of civil liberties. In addition, perhaps this chapter suggests the potential rights impact of a number of other contemporary political issues. Hopefully, it indicates that the civil liberties field is implicated in any number of political issues and is an open-ended area with many unanswered questions beyond the traditional civil liberties contained in the federal Bill of Rights.

The rights possessed by persons with low incomes are discussed. Recent activity in the area of indigent criminal procedure and previously mentioned guarantees of the equal protection of the laws to all regardless of income also are discussed. The continuing preoccupation with the procedural rights of social services recipients is used to introduce a discussion of a potential substantive right to the necessities of life. This is discussed in the context of the new kinds of property--

government subsidies, licenses, franchises and benefits--which have proven difficult to handle in the context of gratuity and may need at least a presumption of entitlement if their arbitrary denial is to be avoided. Constitutional alternatives with respect to guaranteeing all citizens access to the necessities of life also are discussed.

The final essay deals with the potential tensions between the increasingly recognized need to limit the unchecked growth of population and traditional civil liberties. It is noted that the population problem--often conceived to be serious only in developing nations--is especially critical in affluent, consumptive societies, even though they may have a very small population growth rate; for it is in the advanced industrial nations of western Europe and America that the greatest share of the world's finite resources is consumed in a way that is open to challenge as to its necessity and desirability. It is suggested that the current court interpretations of the conflict between an unlimited right of procreation and the need to limit the growth of population probably would permit compulsory family limitation or at least would allow family limitation incentives, if they applied equally to all classes.

Various alternatives do exist for voluntary limitation of population growth. Of these, the questions surrounding the right to an abortion have attained constitutional status and are explored. The potential and the problems of a state constitutional statement on the abortion question are discussed. Also offered is the alternative of a broad statement of intent to check the unlimited growth of population. Such a statement could recognize and commit the state to a resolution of the problem of unchecked population growth and would leave the specific choices for its resolution for statutory explication.

CHAPTER XII

CONCLUSION

The beaten paths of preconceived ideologies can have a dampening effect on the critical assessment state constitutions deserve and demand. It is noted in this chapter that the type of judgment required to assess the proper content and thrust of fundamental law is not strictly of a legal type. The thought of all intellectual disciplines coupled with intuitive notions of what constitutes a just political society are the best guides.

CHAPTER I

INTRODUCTION

I

> The Bill of Rights epitomizes one of our history's most noble and enduringly important themes, the triumph of liberty, yet has been one of the most neglected subjects of historical scholarship. There is no satisfactory study of the origins and framing of the first state bills of rights, nor of the national Bill of Rights; there are few studies of particular rights.[1]

Such a statement, made by one of the foremost constitutional historians living today, should give pause to anyone examining, let alone revising, the written guarantees embodied in a declaration of rights. In Montana, one may be somewhat further hampered by the fact that in the 1889 Constitutional Convention (and in 1884) there was no learned debates on most provisions.[2]

In addition, the fact that the Montana provisions were not original and that there has been almost no Montana scholarship in this topic compels search elsewhere for material that hopefully will give this round of consideration some firm footing.[3]

Lester Mazor has noted the "shock . . . felt by the woodshed type of legal scholar, that is, the kind who lacks an army of research assistants or a battery of subcommittees for his support,"[4] when approaching the study of constitutional liberties.

The Montana Constitutional Convention Commission had neither the army nor the battery, and time and other limitations necessarily narrowed the scope and depth of what follows. No claim can be made that it is final or definitive. However, if it offers some guidance and more provocation to those revising the Montana Constitution it will have served its purpose.

Several other sources deserve careful reading for their insights and errors. Those include the Legislative Council study of the Montana Constitution; the brief report of the Constitution Revision Commission; the bill of rights chapter of We, The People . . . by Lucile Speer; Robert Rankin's booklet on the Bill of Rights, and the Hawaii Constitutional Convention study on the Bill of Rights.[5]

> On July 4, 1951, the Madison, Wisconsin, Capital-Times sent out two reporters to ask people encountered at random to sign a petition saying that they believed in the Declaration of Independence. Out of 112 persons interviewed, all but one refused to sign. The common ground of refusal was not the obvious fact that such a petition is useless. "They were afraid," the newspaper reported, "that it was some kind of subversive document and that they would lose their jobs or be called Communists." This inspired the New York Post to circulate a similar petition and the big city with its foreign-born population did little better. Nineteen out of 161 were willing to sign, but the prevailing reaction was "suspicion, distrust and hostility."[6]

No doubt, since 1951 some resurgence of political vitality has occurred in the United States, particularly in the middle and late 1960s. Still it may be that "far fewer than half of the American people have the remotest idea of what their personal and political rights embrace."[7]

Robert M. Morgenthau recently cited the remarks of Justice William Brennan, Jr., of the United States Supreme Court deploring the fact that many young people know little or nothing about the first ten amendments to the United States Constitution, and that of those who do know, many no longer have confidence in the guarantees expressed there. Morgenthau went on to say:

> It is easy to concur with Justice Brennan's evaluation of the situation, and at the same time, to offer one addendum. Ignorance of the history and nature of our constitutional rights and responsibilities, lack of conviction in its potency, are not limited to the young. The first ten amendments to the Constitution of the United States, like the Ten Commandments, are blithely assumed to be the cherished possession of every American. Yet, this is far from the case.[8]

Where one of the universally avowed principles of a viable republic (to say nothing of a democracy) is an active and

informed citizenry, this lack of awareness becomes discouraging and, perhaps, symptomatic. Various political philosophers[9] have scratched fertile ground in attributing the causes of an inactive citizenry to an eclipse of the possibilities of effective citizen participation, the distractive (as opposed to informative) qualities of mass media, the habit of circumventing political issues and answers in a style designed to conceal more than it reveals, increasingly insulated bureaucratic expertise, and on and on.

Their arguments need not detain us here. What should be noted, however, is that this loss of public understanding and appreciation of the fundamentals of the American political discourse puts anyone approaching the study of constitutional questions at a disadvantage.

It is disconcerting to note the contemporary apathy surrounding constitutional expressions of civil liberties, authored as they were by men who were well aware of the necessity of their work. Bernard Bailyn has discussed the unequalled outpouring of literature and polemic that informed the American Revolution.[10] Others have written of the scholarly turn of American constitution-makers in searching out the principles of "the constitution of power" and their unequalled knowledge on the subject of civil liberties.[11]

Indeed, the only substantial criticism levelled at the authors of the American Constitution (apart from the expressions of "shame and distrust toward Founding Fathers who tolerated slavery, exterminated Indians, and blandly assumed that a good society must be based on private property") is the seemingly unaccountable delay in the mention of a possible federal bill of rights at the Federal Constitutional Convention of 1787.[12] To be sure, this delay provided good fuel for certain anti-Federalists who were suspicious and afraid of the Federalist plan of government to a greater extent than they were concerned with the absence of written guarantees of liberties. But even that seemingly "too little, too late" concern with civil liberties at the 1787 Convention has sound justification in that period's civil liberties situation: the existing state bills of rights were seen by many to be an adequate safeguard for these liberties. The Federalists, especially the dynamic James Wilson at the Pennsylvania ratifying convention, went to great lengths arguing that a federal bill of rights was not necessary as the newly created government had, he said, no powers relating to civil liberties.

That the Federalists were to be proven wrong by history on the point of federal government powers over civil liberties is not overwhelmingly important. What is discouraging, given the colonial agitation for a bill of rights, is the indication that the contemporary period may not have an intuitive commitment to those guarantees. As the American Bar Association has lamented "it is chilling to learn from a recent poll that a majority of Americans are willing to restrict freedoms guaranteed by the Bill of Rights."[13]

That, and the above-mentioned lack of reliable, in-depth work on the subject, does not make the declarations of rights any less compelling an object for study and concern, however. Perhaps it is true that in the last analysis

> the practical reason why civil liberties as traditionally defined and defended do not interest the American is that they are inadequate to express the true dimensions of the problem of freedom and justice today.[14]

Going somewhat further afield, perhaps the central political dilemmas of the modern age are not in the area of essentially personal liberties, but rather fall within the recently emerging debate over public freedom.[15] However, even admitting that the questions surrounding the conventional civil liberties are not the central issues, there is still good reason for careful work in the area. It has been noted that liberties of whatever dimension "evaporate rapidly in the presence of unchecked governmental power."[16]

That fear of governmental power (which mistakenly has been conceived to be the central tenet of the Jeffersonian bias) and the fear of the power of unchecked majorities were commonplace in the thinking of the Founding Fathers. Concern with the excesses of governmental power coupled with the knowledge that the rights of minorities were always insecure in the face of a majority led James Madison, the eventual "father" of the Bill of Rights, to say that the federal republic of the United States would comprehend "in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impractical."[17]

For Madison, the Constitution and the Bill of Rights were insurance against the tendency to override personal and political liberty. That is to say, the safeguards of civil liberty embodied in the Bill of Rights and the Constitution essentially speak to the long-recognized problems of unchecked governmental power and the rule of unchecked majorities.

Commentators on the protection of civil liberties are unanimous on the point of the recent enormous increases in the size, interests and functions of government on all levels. That, coupled with the, democratically speaking, dangerous notion that the government is the major provider of goods and services, makes the traditional jealous regard for individual rights in the face of big government more crucial.[18] Another commentator warns of the "facile assumption that our forefathers were faultless in their formulations;" coupling this with the notions that the states were at one time the primary guarantors of civil liberties and that the states currently have a function as the "little laboratory" for new rights, the challenges of state activity in this area become clear.[19]

Certainly, the Constitutional Convention provides the comprehensive opportunity for dealing with these challenges.

NOTES

1. Leonard W. Levy, "The Right Against Self-Incrimination: History and Judicial History," Political Science Quarterly 84 (1969): 15.

2. John W. Smurr, "A Critical Study of the Montana Constitutional Convention of 1889," (Unpublished Master's thesis, University of Montana, 1951), p. 66.

3. One notable exception to the lack of scholarship is Emilie Loring's study of procedural rights of the criminal defendant in Montana. The study is cited in the section on procedural safeguards.

4. Lester Mazor, "Notes on a Bill of Rights," Utah Law Review 40 (1966): 327. Cited hereafter as Mazor, "Notes."

5. Montana, Legislative Council, The Montana Constitution, Report No. 25 (Helena, 1971); Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Constitutional Provisions Proposed by Constitution Revision Commission Subcommittees, Montana Constitutional Convention Occasional Paper No. 7 (Helena, 1971); Lucile Speer, We, the People... (Bozeman: Cooperative Extension Service, 1971); Robert Rankin, Bill of Rights (New York: National Municipal League, 1960); Hawaii, Legislative Reference Bureau, Article I: Bill of Rights, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968).

6. Irving Brant, The Bill of Rights: Its Origin and Meaning (New York: Bobbs-Merrill Co., Inc., 1965), p. 13.

7. Ibid.

8. Robert M. Morgenthau in Sidney H. Asch, Civil Rights and Responsibilities Under the Constitution (New York: Arco, 1968), p. 5.

9. The political philosophers include Robert Pranger, Joseph Tussman, Sheldon Wolin and Hannah Arendt. They stand at the head of a breaking consensus in the discipline of political science on these matters.

10. Bernard Bailyn, Ideological Origins of the American Revolution (Cambridge: Harvard University Press, 1967), p. 1.

11. See, for example, Hannah Arendt, On Revolution (New York: Viking Press, 1963), p. 148, where she explicitly stresses that the founders and the men of the Revolution

did not need to "dispel their ignorance" on the "safeguards of civil liberties--a subject on which they certainly knew much more than any previous republic. . . ." Cited hereafter as Arendt, On Revolution.

12. Mazor, "Notes," note 161, p. 350. For the pervasive critique, see Staughton Lynd, The Intellectual Origins of American Radicalism (New York: Random House, 1968), p. iii.

13. Jerome Shestack, "Foreword", Human Rights, American Bar Association 1 (August, 1970): viii.

14. Robert Rankin, Bill of Rights (New York: National Municipal League, 1960), p. 7. Cited hereafter as Rankin, Bill of Rights.

15. For example, see Arendt, On Revolution, p. 220, where she states: "Finally, it is perfectly true and a sad fact indeed, that most so-called revolutions, far from achieving the constitutio libertatis [foundation of freedom], have not even been able to produce constitutional guarantees of civil rights and liberties, the blessings of 'limited government', and there is no question that in our dealings with other nations and their governments we shall have to keep in mind that the distance between tyranny and constitutional, limited government is as great as, perhaps greater than, the distance between limited government and freedom. But these considerations, however great their practical relevance, should be no reason for us to mistake civil rights for political freedom, or to equate these preliminaries of civilized government with the very substance of a free republic. For political freedom, generally speaking, means the right 'to be a participator in government', or it means nothing."

16. Public Administration Service, Civil Rights and Liberties, Staff paper prepared for the Alaska Constitutional Convention (Chicago, 1955), p. 1.

17. James Madison, Federalist Papers, No. 51 (New York: New American Library, 1961), p. 324.

18. See, for example, Rankin, Bill of Rights, p. 20.

19. Mazor, "Notes," p. 350.

CHAPTER II

HISTORICAL BACKDROP

INTRODUCTION

The story of how Americans came to rely primarily on written and legally enforceable guarantees of civil liberties provides an interesting base for the study of the American political climate. An in-depth discussion of the historical initiation and use of declarations of rights and principles is beyond the scope of this report. What will be attempted is a brief introduction to the seriousness and historical depth of written, essentially negative protections against certain governmental encroachments as they were incorporated into the state and, later, the federal government's fundamental laws.[1] Special emphasis is placed on the colonial period and the attitudes leading to the drafting of the federal Bill of Rights. The richness of the political character of these guarantees is perhaps best indicated during that period. Too, from that period can be derived some insight into the contemporary concern with the role of a state bill of rights.

THE HERITAGE

According to Leila Roberta Custard, "a rich, significant meaning lies at the heart of the term 'bill of rights' as it is used in our country today."[2] The history of bills of rights and the concept of liberty they embellish is a record of a depth of political conflict, contingency and struggle that no imagination can grasp in its entirety. Behind every phrase in the various bills of rights lies much more than a certain tonnage of case law; "each clause is the crystallization of experience gained at the price of human oppression and suffering."[3]

Irving Brant speaks to this point when he says in writing the history of civil liberties it is crucial

> to pursue the struggle to free men's minds . . . keeping in mind that, on both sides of the Atlantic, it is far more a story of cruelty and oppression--of denials of liberty and perversions of the institutions of justice--than it is of willing recognition of the rights of man.[4]

HISTORICAL BACKDROP

The concepts behind the written guarantees of civil liberty--liberty and rule by the authority of nature and reason--have deep roots.[5] For example, it was probably in the fifth century B. C. that a term corresponding to the present term for "statutory law" was changed from its older connotation as "an enactment imposed from above"--or "something imposed by an external agency, conceived as standing apart and on a higher plane than the ordinary, upon those for whom it constitutes an obligation"--to a different term with a distinct meaning.[6]

The two terms, oesmos and nomos, used in Athens and throughout the Greek world, approached the notion of a statute from opposite directions. The term nomos, used exclusively after 511-10 B.C., carried with it a sense of obligation as did oesmos; but nomos "is motivated less by the authority of the agent who imposed it than by the fact that it is regarded and accepted as valid by those who live under it."[7] That is to say, nomos regards law "as the ratification of what is generally regarded as valid and binding," whereas oesmos carries with it a twinge of arbitrariness, of authoritarian imposition.[8]

The direction from which nomos approaches the notion of statute lends itself easily to the idea of popular sovereignty--people who are obligated to obey are also the ultimate judges of the wisdom of enactments. As noted by one commentator:

> [T]he "obligatoriness" of the laws does not consist in their undoubted capacity to compel observance, but in the possibility, which does not belong to all laws, of being accepted and obeyed by the "good citizen".[9]

The ancient notion of "natural law" also informs the concept of liberty and the central questions of political obligation. In classical antiquity natural law often was compared to and contrasted with the positive law of particular polities.[10] The natural law--really a kind of philosophy of law--was not conceived as part of the system of law itself; rather it was a kind of "meta-law," a whole conception of what was appropriate in legal situations. It was, then, an understanding with which actual legal systems were comprehended, assessed and criticized.[11]

Hippias and the Sophists in the late fifth century B.C. urged a conception of rights by nature which they distinguished from rights by law; they also stressed the unchangeableness of the natural right as against the variability and derivative nature of the legal right. Where the two conflicted, the natural law superseded.[12] Aristotle echoed Demosthenes (c.350 B.C.) when he advised advocates that they should "appeal to the law

of nature" when they had "no case according to the law of the land."[13] Demosthenes had said that "every law is a discovery, a gift of God, a precept of wise men."[14] Aristotle also quoted Sophocles who, in the well-known tragedy, Antigone, said "an unjust law is not a law."

These ideas reflected themselves across time, having a profound influence on the Founding Fathers who consulted the classics for their ideas on the propriety of certain political ideas. For example, Demosthenes' idea that law was a discovery is reflected in the pervasive colonial belief that a written constitution was not the source of certain inalienable rights but merely served to better protect them.

According to Edward Corwin, the American tradition of civil and constitutional liberty has its source in Cicero's conception of a cosmic reason which directs the movements of the heavenly bodies and the conduct of good men alike. In Concerning the Commonwealth, Cicero wrote of the natural law as "right reason, harmonious with nature, diffused among all," a law which "may not be derogated or abrogated," a law which "requires no interpreter, since all men are capable of understanding it, a law which is the same for Rome as for Athens, the same at one time as at another" (emphasis added).[15]

That passage bears a striking resemblance to one in the Declaration of Independence which reads:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; and that among these are Life, Liberty, and the pursuit of Happiness [emphasis added].

Separated by nearly twenty centuries, two major statements of political theory enunciate the same principle: a universal law self-evident to the intuitive common sense of all men. Such is the depth of the heritage implicit in the timeless principles of bills of rights.

EARLY ENGLISH DOCUMENTS

The earliest of the famous documents of civil liberty is the Magna Carta (Great Charter) of 1215. Certain protections, notably due process of law, were extracted from King John by a group of Barons in hostile assembly at Runnymede. Although the Magna Carta was, in all probability, "something less than a passionate blow for liberty,"[16] the document and its

interpretations across time provided a potent springboard for claimants of extended liberties for centuries after its enactment. The aura surrounding the Magna Carta, that it subordinated the King to the rule of law, although not completely accurate, sheds some light on the future importance of that thirteenth century document. The rule of law--especially, in this case, the notions that the rulers were to be subject to law--can be found in antiquity. Plato, perhaps best known for attempting to make the world safe for philosophers, wrote in the Statesman and in the Laws of a second-best polity based on the rule of law.[17]

This principle persisted up until the present, its most popular formulation being borrowed from the seventeenth century English political theorist, James Harrington, and finding its way into the Massachusetts Constitution of 1780: "a Government of Laws and not of Men." The fact that this principle and others--such as "no taxation without representation"--were credited by men of the American Revolution to the Magna Carta shows that a political document or event (as is also the case with good literature of all types) has a "life" of its own beyond the intent or circumstance of its leading personalities. That certainly is the case with the Magna Carta.

An almost forgotten document in the development of the liberties of Englishmen is the Confirmatio Cartarum (Confirmation of the Charter) of 1297, in which the principles of the Magna Carta were ordered "kept without breach." This statute also declared that a judgment contrary to the Magna Carta's precepts would be "holden for nought." In doing so, it set the frame for the notion that a law higher than that of legislative enactment could be written; in fact, it can be said that it is the forerunner of the principle of a written constitution, whose purpose it is to set down a fundamental base in accordance with which statutes are enacted.

The law which grew up around these and other documents of English constitutional history informed the colonial understanding of civil liberties. One important distinction must be noted, however: where the English constitution remained largely unwritten, the thrust of the American colonial effort was to make constitutional principles explicit in written form.

THE COLONIAL DOCUMENTS

In 1606, a Stuart king initiated the "charter period" of civil liberties documents by granting a short-lived charter to the

first settlers of Virginia. This was the first successful implantation of the soon-to-be-crucial principle that

> the colonists . . . enjoy all Liberties, Franchises, and Immunities . . . to all Intents and Purposes as if they had been abiding and born, within this our realm of England, or any other of our said Dominions.[18]

In 1639 the first colonial list of rights which could be called a "bill of rights" was passed by the Maryland General Assembly. A short statement, it also guaranteed to all the Christian inhabitants of the colony (slaves excepted) all the "rights, liberties, immunities, priviledges and free customs . . . as any naturall born subject of England hath or ought to have or enjoy." The common law of England was specifically mentioned as a part of this inheritance. In addition, the Magna Carta guarantee of due process of law was specified.[19]

In general, in the early colonies, the primary concern was for the welfare of the community; accordingly, the protection of personal liberties came second. Nonetheless, during this period in which necessity was harshly present, a student of law and practicing barrister in the English common law courts drafted a detailed list of rights which became the Massachusetts Body of Liberties of 1641. The list included due process of law, equal protection of the laws and the right of petition; it forbade monopolies and provided that those who adhered to the Congregational form of worship could exercise freely their religion. Other rights included the freedom from barbarous or cruel punishments; a requirement that where the death penalty was to be inflicted the testimony of two witnesses was required; the right of counsel, provided the client did not pay counsel; annual elections, and the right of a woman to be free from physical abuse at the hands of her husband unless she initiated the assault. Another interesting provision stipulated that no person could be conscripted into the military for service outside the colony.[20] Later additions to this list of liberties included the enumeration of state officials to be elected each year: governor, deputy governor, assistants and their representatives or deputies.[21]

One of the rights not expanded in the Puritan colony was the narrow free exercise of religion clause. The Puritans were not ready to grant to persons who were heretics--by Puritan definition--the rights to the free exercise of religion. In fact, one of the earliest disputes in Massachusetts involved the banishment of Anne Hutchinson and Roger Williams from the colony for their Anabaptist tendencies. Williams eventually founded the colony of Rhode Island in 1663 and his insistence

on religious toleration resulted in the colonial charter specifying the right to the free exercise of religion. The limited extent to which religious toleration was applied even in this early example can be seen in the fact that Rhode Island carried on its statute books, from 1719 to 1783, a provision excluding Roman Catholics from public office (although there is a good chance the provision was not enforced).[22]

Religious toleration was also an issue in Carolina where in 1663 the colonial proprietors granted limited religious toleration. Dissenters were required to swear to a loyalty oath. And, in any case where the peace of the community might be disturbed as a result of nonconformists practicing their religion, such practice was prohibited.

In 1676, the laws of West New Jersey were drawn up "to be the foundation of the government . . . not to be altered by the Legislative authority. . . ." These laws were, by this provision, made more binding than ordinary legislative enactments. This amounts to a further precedent for the written constitution, a body of law which is more fundamental than, and controlling upon, statute or law. Under these laws a person who worshipped God was free in matters of religious worship. No resident could be deprived of life, liberty or property without a jury trial; the jury was to consist of twelve good men of the accused person's neighborhood. The accused could challenge the seating of up to thirty-five juries with no reason necessary; with a valid reason, there was no limit to the number of challenges he could have. Other procedural guarantees which were incorporated included mandatory jury trials and the right of an accused to represent himself. To assure that these rights were observed, proprietors instructed that they "be recorded in a fair table . . . in every common hall of justice within [the] province."[23]

Two further colonial charters with restrictive statements of the right of religious liberty were issued in the 1680s. The New Hampshire Charter contained no personal rights provisions beyond guaranteeing the liberty of religious conscience to Protestants. The Pennsylvania Frame of Government, granted by William Penn, contained fairly extensive guarantees of personal rights. Free men were authorized to elect the General Assembly, to plead their own cases and to have "justice speedily administered" by a twelve-man jury. Religious toleration was accorded only to those "who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the World." Such a provision was a notable break with the prevailing narrow conception of religious toleration ordinarily granted only to certain sects.[24]

A change in the method of initiating civil liberties guarantees in the colonies occurred in 1683 when the General Assembly of New York passed a charter of liberties and privileges which guaranteed a number of personal rights. A provision reminiscent of Magna Carta guaranteed due process of law. Jury trials were assured to the accused. Bail was permitted except in cases of treason or felony. Quartering troops in private homes was prohibited in peacetime and martial law was prohibited. As long as they did not disturb the civil peace, Christians were assured of the freedom of religion. A small crisis developed when the new king refused to approve the legislation. The New York Legislative Council re-enacted essentially the same guarantees in 1691. Although the charter lacked the permanence of the colonial charters, it then became law. During the intervening eight years, the Glorious Revolution of 1688 had occurred in England. Parliament was on the rise in terms of power and the royal prerogative was diminished.[25]

At the opening of the eighteenth century, the Pennsylvania Charter of Privileges was adopted. Until the American Revolution, this declaration remained the most impressive list of rights of the colonial period. Article I of the charter declared that true happiness would be unknown to mankind unless there was no abridgment of the freedom of conscience in matters of religion and worship. A separate provision declared that any future attempts to alter the section on the liberty of religious conscience would be illegal. Such a provision would later be employed by Thomas Jefferson in an effort to check the power of future legislators to repeal laws which protected basic liberties. A number of present-day state constitutions still have this type of principle in the declaration of rights, excepting the rights out of the powers of government in an effort to block future abridgment. Other provisions in this charter guaranteed due process of law and exempted the estates of persons committing suicide from seizure by the state.[26]

THE REVOLUTIONARY PERIOD

During the following period, from 1700 to 1760, the axiom that political theory is seldom born in tranquil times was the rule. It was not until the colonists found themselves in a political crisis with England that attention was again focused on the rights of men. Subsequent to parliamentary enactment of the Revenue Act of 1764 the colonists increasingly complained that they were being denied the rights of Englishmen by being taxed while having no representation. What one

commentator has referred to as the "distinctive political culture of the revolutionary period" was born.[27] Along with it was begun the second surge of written declarations of rights.

Meeting in response to the passage of a second revenue-extraction measure--the Stamp Act--the Stamp Act Congress of 1765 issued a set of grievances in which it asserted several liberties including the right of petition, trial by jury, and the "full and free enjoyment of their liberties."[28] A town meeting in Boston in 1772 also alluded to some personal rights. Complaints were lodged against the writs of assistance with which royal officers searched for contraband, against quartering troops and against violations of the right of trial by jury.

The deep dissatisfaction of the colonies was not destined to continue as isolated pockets of resistance. On the eve of the meeting of the 1st Continental Congress, Samuel Adams urged a national bill of rights as a step toward negotiation with Great Britain. The Congress passed a Declaration of Rights on October 14, 1774. The avowed validity of the resolution was based on "the immutable laws of nature, the principles of the English Constitution, and the several charters and compacts" of the colonies.[29]

In near unanimity the Congress later used the declaration of rights as an instrument of propaganda in a letter to prospective allies in Quebec. This letter declared such principles as the rights of Englishmen, the rights of assembly and petition, the right to trial by one's peers, the right to participate in the legislative branch, habeas corpus and the freedom of the press. In this early acknowledgment of the freedom of the press, the Congress wrote that the importance of a free press consists

> besides the advancement of truth, science, morality, and acts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.[30]

Although these resolutions did not recruit Quebec to the colonial cause, the strong statements of fundamental rights foretold some of the future content of similar declarations.

Six months later, a band of townspeople who had assembled at dawn in the town square of Lexington to resist the British were overrun. While the Continental Congress maintained an army, emitted bills of credit and generally preserved order, the colonies began to act increasingly in an independent way while debating the prospect of severing ties with Great Britain.

Reflecting on the opposition to an effort to declare independence from Britain, John Adams wrote that "all great changes are irksome to the human mind, especially those which are attended with great dangers and uncertain effects."[31] His statement was suggestive of the later statement in the Declaration of Independence:

> [P]rudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.

Three weeks later, the Virginia state convention, meeting in Williamsburg, drafted and passed a resolution asking Congress to declare the colonies free and independent states. At the same time, the convention passed a resolution calling for a committee to draft for Virginia a declaration of rights and a plan of government. Perhaps no single document has had a greater effect on the shape of American bills of rights than what became the Virginia Declaration of Rights.[32] The individual principally responsible for the finished product is a man who is sometimes overlooked as an inspiration for civil liberties in early American history. George Mason had been active as a partisan of colonial rights for a number of years. He possessed uncommon enlightenment; for example, he had urged for a number of years the abolition of the slave trade as "wicked, cruel, and unnatural." His importance in the effort to secure a federal bill of rights is discussed below.

Shortly after the Virginia convention adopted its bill of rights and constitution, the Continental Congress issued what "was almost immediately accepted as a national bill of rights."[33] The Declaration of Independence, principally drafted by Thomas Jefferson, and containing no new bill of rights concepts (with the possible exception of civilian control of the military), ended the claims that the colonists had rights by virtue of their being Englishmen. Although English constitutional history still provided valuable historical material for the development of certain rights, the colonists henceforth expressed their rights as the natural and inherent rights of all men.

In the intervening years between the 1776 Declaration and 1784, every section of the republic followed the Virginia example and adopted a declaration of rights. Most of the political leaders did not want citizens' personal rights to be dependent upon the common law alone. Without even bothering to examine the common law to discover whether certain protections could be found there, the colonies wrote what they felt to be the essential safeguards into their fundamental laws. Thus the process of distilling natural rights into civil rights and according civil rights constitutional sanction was initiated.

Copies of the Virginia Declaration of Rights were circulated throughout the colonies and served as a model for at least seven colonies which, in some cases, adopted its articles verbatim.

Although there is a paucity of historical evidence, the greatest concern with the principle of popular rights was probably displayed in the Pennsylvania convention. It was a scant two weeks after the Declaration of Independence was adopted that this convention met; in fact, when an urgent call to the convention from Congress for militiamen demanded some response, so many of the delegates were working on the declaration of rights that action had to be delayed until a quorum could be summoned.[34]

In several respects the Pennsylvania declaration went beyond the one previously adopted in Virginia. Both were on the same ground in guaranteeing a speedy and public trial, freedom from general warrants, freedom of the press, the right to bear arms and civilian control of the military. In addition, the Pennsylvania declaration exempted from military service all conscientious dissenters and granted the freedom to travel from the state and form a new state. The Virginia declaration did not grant the former and it discouraged the latter.

When the New Hampshire bill of rights and constitution, habitually rejected between 1778 and 1784, finally was adopted, the state with the first independent temporary government closed the revolutionary period of bill of rights drafting. An interesting provision in this document--one which is suggestive of Article III, Section 24 of the Montana Constitution--provided that penalties should be "proportioned to the nature of the offence . . . . The true design of all punishment being to reform, not to exterminate, mankind."[35]

THE EARLY "FEDERAL-STATE" RELATIONSHIP

Within six years of the adoption of the Declaration of Independence, the essential shape of guarantees of civil liberties was clear. The states, operating as fully sovereign entities, all had lists of rights which to the colonial mind harbored the essence of personal liberty. There was little concern that a national government--at that time still the Confederation--would exercise any powers over the liberties of citizens. In fact, the Continental Congress had dealt with an issue of this sort when it was confronted with the problem of whether to arrest deserters from the Continental army. Thomas Burke of North Carolina sounded a warning that for the Congress to do so would set a bad precedent:

> [I]t might render ineffectual all the barriers provided in the states for the security of the rights of citizens. . . and the subject of every state was entitled to the protection of that particular state.[36]

This reasoning, that a citizen's rights were a state concern and not to be tampered with by the national Congress, was accepted by the Congress and the public. Accordingly, there was no demand for a federal bill of rights between 1777 and 1786. It was only as a result of the popular alarm created by the concentration of power proposed in the 1787 U.S. Constitution that agitation for what became the federal Bill of Rights was brought about.[37]

THE 1787 FEDERAL CONSTITUTIONAL CONVENTION

Although there was no consensus on the merits of calling a convention to revise the Articles of Confederation under which the united colonies operated for slightly more than twenty years, there was a good deal of dissatisfaction over the existing form of government. One can understand the depth of such dissatisfaction without going into the body of criticism leveled at the Confederation. When George Washington was asked to use his influence in such areas as western Massachusetts which, "throughout the entire Revolutionary era were in a state of virtual rebellion from the governing authorities in the east,"[38] he replied that "Influence is no Government. . . . Let us have one by which our lives and liberties and properties will be secured; or let us know the worst at once."[39]

In general, the criticism leveled against the government under the Articles of Confederation was that it was no government at all, only influence. Typically, the concern expressed was that the government was unable to preserve order, protect property, or adequately defend itself against foreign powers. Significantly, in all the newspaper articles and volumes of private correspondence calling for changes in government, there appears no complaint about the infringement of personal rights. Therefore the delegates who came to Philadelphia to write the blueprint for a stronger central government were not at the outset concerned with specific, written guarantees of civil liberties. Of the two who could be especially counted upon to champion personal liberties, one, Thomas Jefferson, was out of the country.[40] And it was not until the convention was nearly over that the other, George Mason, rose on the floor of the convention and complained of lack of a bill of rights. According to the Madison notes, Mason said such a list of rights "would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours."[41]

Delegate Gerry then made a motion to appoint a committee to prepare such a declaration. Mason seconded the motion. According to notes kept by James Madison, delegate Sherman then rose and announced that he too "was for securing the rights of the people where requisite." He believed, however, that since "the State Declaration of Rights are not repealed by this Constitution" these state protections of civil liberties were sufficient.[42] Mason responded that under the supremacy clause "the Laws of the U.S. are to be paramount to State Bill of Rights." Mason's fears that the federal government would assume powers affecting the civil liberties of citizens notwithstanding, ten states voted "no" on the question of appointing a committee to draft a list of protections.[43]

Thereafter, Mason was to write--on the blank pages of a convention draft proposal--his objections to the Constitution as it was taking shape. His principal objection--an objection which was to haunt the entire ratification process--was that

> there is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law. . . .[44]

Mason and Gerry thereafter attempted a series of piecemeal amendments, all of which were unsuccessful. On the final day of the Convention, Mason voiced his fear that the federal government being created could become oppressive. Mason was

joined by Elbridge Gerry and Edmund Randolph in refusing to sign the final document. Gerry said he could get over his serious objections to the powers granted Congress; what he said he could not ignore was that the rights of citizens were rendered insecure by a judiciary without a jury--in his eyes, a Star Chamber. However, as the Convention adjourned and the delegates headed home, the primary concern was to secure ratification of the new Constitution.[45]

George Washington lent his support to the ratification cause with a letter from Washington. From Paris, however, came a different response. Thomas Jefferson, who had viewed the operation from a distance, was concerned about the new structure of government. After carefully reviewing the proposed Constitution, he wrote to James Madison that what he did not like about the document was "first the omission of a bill of rights providing clearly & without the aid of sophisms" the list of rights accepted as fundamental in America. Jefferson took issue with the Federalist persuasion that viewed rights as beyong the scope of the newly created government; such a notion left him uneasy. There was no assurance in the proposed Constitution that the states retained powers not delegated to the federal government. As an afterthought Jefferson scribbled a now famous passage in the margin of the letter:

> Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just should refuse, or rest on inference.[46]

Jefferson continued to write on the need for a bill of rights, urging that no more than nine states ratify the Constitution until a bill of rights could be appended. On this issue the Federalists and anti-Federalists clashed in every state ratification convention. Delaware ratified quickly and unanimously. An effort to amend the document with fifteen propositions was turned down in Pennsylvania, 46-23. An identical vote ratified the document.[47] Twenty-one of the twenty-three minority voters then set up their own "rump convention" and announced that a "bill of rights was indispensable to ascertain and establish 'those unalienable and personal' rights of men.[48] New Jersey and Georgia ratified unanimously and were followed by a three-to-one vote in Connecticut. By early January of 1788, scarcely four months after the Convention had adjourned, five states had ratified. Then the complexion of the ratification process changed. The Massachusetts convention stood on the verge of rejecting the document by a narrow margin. Desperate Federalists at that convention were found offering amendments to alleviate the criticism that the document had

no bill of rights. At this point in the ratification process, a twist of fate began to affect events which followed. The anti-Federalists, at the peak of their strength, found themselves confronted with an uncooperative postal service. News of an event which occurred in Philadelphia on December 18--the minority organization of a "rump convention" in Pennsylvania--had not reached Boston when the Massachusetts convention adjourned on February 9. Difficult though it is to speculate seriously on these matters, it seems certain that such news would have added weight to the anti-Federalist effort to stop the Constitution at the Massachusetts ratification convention.[49]

At the end of all the arguments, the Federalists carried the ratification vote by the narrow margin 187-168. Such a vote could only be secured by the convention's agreeing to send along with the ratified document recommended amendments. Among the nine articles adopted were: a reservation to the states of powers not delegated to the federal government, an injunction against Congressional regulation of elections, a prohibition against Congressional levying of direct taxes or creating monopolies and the necessity of the grand jury. No provision was recommended on free speech, press or conscience.

After the New Hampshire convention temporarily adjourned (giving the Federalists time to regroup), the Maryland convention convened and quickly ratified the Constitution. In the South Carolina legislature, a one-vote majority approved the call for a convention. This convention also ratified by a healthy margin; in the process it also adopted several recommendatory amendments. With eight states having ratified, the whole scheme was not yet completed. It was not until the convention of New Hampshire ratified by a ten vote majority that the new document was assured a trial. In addition to the Massachusetts personal liberties amendments, the New Hampshire convention recommended a three-fourths majority of Congress for the maintenance of a standing army, prohibitions on quartering of troops, the right of citizens to bear arms and an assurance that Congress would not abridge the free exercise of religious conscience.[50]

By this stage of the ratification procedure, the Federalist opposition to a bill of rights had collapsed, if only in exasperation. In general, the anti-Federalist misgivings as to the powers of the proposed federal government were supplanted by what was, in reality, only one of their objections to the new scheme of government. The upshot of it all was that of the four remaining states to ratify the Constitution--Virginia, New York, North Carolina and Rhode Island--two adopted proposed amendments; one in refusing to ratify the document declared itself to be in a state of friendly suspension

with the union, and the other waited until early 1790 to even call a convention. During this time all but the most hardened Federalists had accepted the idea of a federal bill of rights. It was the task of the 1st Congress to draft such a list of guarantees.[51]

THE FEDERAL BILL OF RIGHTS

A few months before the 1st U. S. Congress was to meet, James Madison wrote to Jefferson that he had "always been in favor of a bill of rights" even though many good men had felt a declaration of rights would be out of place in the Constitution. Madison's support was conditioned on the assumption that such a bill of rights be framed so "as not to imply powers not meant to be included in the enumeration" (emphasis added).[52] Thus, Madison's chief fear was that government might infer from a list of rights powers not delegated to it. Although he did not share the extreme Federalist belief that the newly created government had no powers in the civil liberties area, he was afraid that some of the most essential rights could not be written down "in the requisite latitude."

In the same letter Madison offered two rationales for adopting a bill of rights. First, he hoped it might create a national tradition to "counteract the impulses of interest and passion." On this count he had no misgivings. He was well aware that when it was most needed a bill of rights was most often transgressed. He noted that legislative majorities in every state had violated what he called "parchment barriers" whenever it served their interest to do so. The chief danger to individual rights, as he saw it, was precisely when the government operated as "the mere instrument of a major number of constituents."[53] Madison's second rationale for a bill of rights was that it could provide "good ground for an appeal to the sense of the community." In other words, it would provide the public with a written document from which to appeal against undue governmental actions.[54]

In drafting the federal bill of rights, Madison preferred to borrow the general principles from the states' bills of rights rather than attempt to catalog a long list of protected activities. Believing that "the best security against these evils is to remove the pretext for them," he never intended to compile any complete list for attachment to the Constitution. That is to say, the principal draftsman of what became the federal Bill of Rights never believed he was writing a complete list of safeguards.[55]

With the Virginia legislature still pushing for a new convention to draft amendments to the Constitution, Madison emerged as a kind of rights champion and prodded Congress to hear his proposed bill of rights. Although the anti-Federalists had some misgivings when faced with the prospect of a leading Federalist drafting the federal civil liberties protections, Madison borrowed heavily from the Virginia Declaration of Rights--which was drafted by the anti-Federalist George Mason. After he had read his proposals he delivered a lengthy speech favoring a bill of rights in which he used many of the arguments Jefferson had sent him through the mails.

After numerous delays and much publicity, seventeen amendments were sent from the House to the Senate. During the Senate debate--closed to the public--on the proposals, the amendment which Madison prized most was dropped. This was a provision which prohibited the states from infringing their citizens' personal rights. However, after further wrangling, a conference committee sent twelve proposals to the states for ratification. This congressional approval of civil liberties amendments brought about North Carolina's ratification of the Constitution.[56]

On December 15, 1791, the Virginia legislature--the first to provide legal safeguards for personal liberties--became the eleventh state to ratify the proposed amendments.[57] Three-fourths of the states had ratified the amendments and they took effect. Thomas Jefferson, as secretary of state, officially announced the ratification of the Bill of Rights. Doing so must have offered him some relief, for he had earlier argued that

> the spirit of the times may alter, will alter . . . [and thus] the time for fixing every essential right on a legal basis is while our rulers are honest, and ourselves united. From the conclusion of this war [the Revolution] we shall be going down hill.[58]

To be sure, the political vitality of the country would in all probability never approach the same levels of the revolutionary period. The long history of pitched battles over civil liberties was begun. Perhaps no single attribute of American government has provided as much controversy--from the Alien and Sedition Act of 1798 to the Chicago 8 trial of 1970--as these guarantees of civil liberties. Demanded and written by the rebels of that day they are still explored and invoked by revels of the present. This is not too surprising; as one commentator has written, "the job is never done."[59]

Oscar Handlin, speaking specifically of the colonial period and the enactment of the federal Bill of Rights has said that "the designation [Bill of Rights] was inappropriate." He goes on to say that assumptions that the Founding Fathers had arrived at a clear understanding of what their civil liberties were and the assumption that the Bill of Rights was a "reasoned, calculated enumeration of the freedoms that Americans valued" are both wrong:

> The content of these rights was not defined from the start. Rather, an understanding of what they involved developed only slowly and piecemeal as the Americans gained experience with self-government.[60]

During one part of the process of defining these guarantees--judicial interpretation--the federal government has attained a position of ascendancy. The following chapter discusses the possibility that, this occurrence notwithstanding, the states have a vital role in the area of the protection of civil liberties.

THE MONTANA DECLARATION OF RIGHTS

A brief note on the history of Montana's declaration of rights is in order. In general, the wording of the present declaration of rights appears to have been derived almost verbatim from Article II of the Colorado Constitution.[61] This particular line of derivation of fundamental rights is not especially significant, however; far more important to the shape of the guarantees adopted in Montana was the sheer weight of tradition attached to the concept of a declaration of rights. Having said this, it should be noted that three instances in which the 1889 Montana Constitutional Convention departed from the Colorado examples do appear to be significant. These three departures are discussed briefly in the essays on Rights of Incarcerated (Chapter VI), Eminent Domain (Chapter VIII) and Equal Protection of the Laws and Freedom from Discrimination (Chapter X).

NOTES

1. This report does not deal with the notion of positive liberty. Some mention of that concept will be made in a subsequent report on the First Amendment Freedoms. That report will discuss the distinctions between "negative protection" and "positive liberty" and, in somewhat more detail, the distinction between the type of freedom incorporated in the First Amendment and the liberty of, say, the Fifth Amendment.

2. Leila Roberta Custard, Bills of Rights in American History (Los Angeles: University of Southern California Press, 1942), p. 9. Cited hereafter as Custard, Bills of Rights.

3. Ibid.

4. Irving Brant, The Bill of Rights: Its Origin and Meaning (New York: New American Library, 1965), p. 89.

5. See e.g.: Aristotle: Politics (New York: Oxford University Press, 1962), wherein Aristotle stressed: "Law may thus be defined as 'Reason free from all passion.'" 1287a Sec. 5, p. 146.

6. Martin Ostwald, Nomos and the Beginnings of the Athenian Democrary (Oxford: Clarendon Press, 1969) p. viii, 55.

7. Ibid., p. 55.

8. Ibid., p. viii.

9. Alexander Passerin d'Entreves, The Notion of the State (Oxford: Clarendon Press, 1967), p. 228.

10. A. P. d'Entreves, Natural Law (London: Oxford University Press, 1951), pp. 29-30.

11. J. R. Lucas, The Principles of Politics (Oxford: Clarendon Press, 1966), p. 333.

12. Custard, Bills of Rights, p. 10, states that Protagoras himself expounded a natural law theory. It is more likely that it was Hippias who did so in the Platonic dialogue Protagoras. Protagoras himself did not accept the "Sovereignty of Naturrecht" (natural right). See Ernest Barker, Great Political Theory (New York: Barnes and Noble, 1960), p. 69 ff.

13. Aristotle, Rhetoric, I, 15, 1375a, A 27f. Cited from Edward S. Corwin, Liberty Against Government (Baton Rouge: Louisiana State University Press, 1948), pp. 12-13. Cited hereafter as Corwin, Liberty.

14. T. E. Holland, Elements of Jurisprudence (12th ed. 1916), p. 44, note 1. Cited from Corwin, Liberty, p. 12.

15. Lactantius, Div. Inst. (Roberts and Donaldson tr., 1871), vi, 8, 370. Cited from Corwin, Liberty, p. 14.

16. John Roche, Courts and Rights (New York: Random House, 1965), p. 1.

17. To be sure, there is an important distinction to be made between Plato's law and the contemporary statute. The ethical preambles to the Platonic statutes were much longer than the statutes themselves. This was Plato's effort to keep statutes from becoming bare imperatives, each with its own penal sanction. See A. E. Taylor, introduction to The Laws (London: J. M. Dent and Sons Ltd., 1960), pp. xv-xvi.

18. First Charter of Virginia, April 10, 1606. Cited from Richard L. Perry, Sources of Our Liberties (Rahway: Quinn and Boden Co. Inc., 1959), p. 44. Cited hereafter as Perry, Our Liberties.

19. Robert Rutland, The Birth of the Bill of Rights (Chapel Hill: University of North Carolina Press, 1955), p. 14. Cited hereafter as Rutland, Bill of Rights.

20. Perry, Our Liberties, p. 149.

21. Ibid.

22. Ibid., pp. 16-18.

23. Ibid., p. 20.

24. Ibid.

25. Ibid., p. 21.

26. Ibid., p. 23.

27. Gordon S. Wood, The Creation of the American Republic: 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), p. viii. Cited hereafter as Wood, The American Republic.

28. Rutland, Bill of Rights, p. 25.

29. Ibid., p. 26.

30. Ford, ed. Journal of Continental Congress, I, 106. Cited from Ibid., p. 28.

31. John Adams to James Warren, April 22, 1776. Cited from Ibid., p. 30.

32. See Appendix C.

33. Custard, Bills of Rights, p. 12.

34. Rutland, Bill of Rights, pp. 45-6.

35. Ibid., pp. 74-6. See Chapter VI on rights of the incarcerated.

36. Burnett, ed., Letters of Members of the Continental Congress, II, 276. Cited from Ibid., p. 79.

37. Rutland, Bill of Rights, p. 79.

38. Wood, The American Republic, p. 284.

39. George Washington to Henry Lee, October 31, 1786. Cited from Rutland, Bill of Rights, p. 106.

40. Jefferson had taken a ministerial post in France. His letters, to a convention whose secret sessions he could not read about in the papers, contain his thoughts on a proper constitutional framework. Rutland, Bill of Rights, p. 107.

41. Max Farrand, ed., The Records of the Federal Convention of 1787 (New Haven: Yale University Press, 1911), 2:587-8. Cited hereafter as Farrand, Records. Rutland has written that "of course, there was nothing unusual in the fact that the personal rights of citizens were not a topic of discussion in the preliminary debates. Under the Confederation, these rights have been under State protection. There was no reason to assume that this protection had been lifted as long as the nature of the new government was unknown." Rutland, Bill of Rights, p. 107.

42. Farrand, Records, 2:588.

43. Ibid.

44. Ibid., II, p. 637.

45. Rutland, Bill of Rights, pp. 117-18.

46. Thomas Jefferson to James Madison, December 20, 1787. Cited from Ibid., p. 129.

47. Ibid., pp. 135, 141.

48. Ibid., p. 141.

49. An indication of the ambiguous nature of the libertarian commitment of the Massachusetts anti-Federalists can be seen in the fact that they opposed the Constitution's ban on religious tests for public office. Their opposition to this ban was especially strong in the Massachusetts ratification convention. Precisely at the time they were arguing for a federal Bill of Rights they were opposing one of the explicit liberties already in the proposed Constitution.

50. Rutland, Bill of Rights, pp. 161-2.

51. Ibid., pp. 162-89.

52. James Madison to Thomas Jefferson, October 17, 1688. Cited from Ibid., p. 192.

53. Such a statement is suggestive of a similar distinction that was being made on the other side of the Atlantic. Immanuel Kant, Konigsberg philosopher, understood well the difference between social conventions (mores) on the one hand and morality on the other hand. The implication of Madison's utterance is that the danger to civil liberties is not a product of the mere existence of government; rather it is most likely that civil liberties will be violated when a government acts claiming that a majority--silent or vocal--adheres to its policies. This distinction--which is at least as old as Socrates--has particular relevance in the area of First Amendment Freedoms.

54. Rutland, Bill of Rights, pp. 192-4.

55. Madison's understanding of the form of the federal Bill of Rights is crucial when, for example, one confronts the argument that the contemporary states should adopt the federal bill in toto as their own. To do so would amount to accepting what was, by its authors own admission, a whittled down version of the then-existing state

bills of rights. (To be sure, the First Amendment is an example of an addition that was made to the typical state provisions.) This point is also discussed in Chapter III.

56. Rutland, Bill of Rights, pp. 202-16.

57. Two amendments--one calling for a fixed ratio of House of Representatives seats and one prohibiting Congressmen from altering their salaries until an election had intervened--were not ratified. Massachusetts, curiously enough one of the first states to demand a federal bill of rights, did not get around to ratifying the first ten amendments until 1941.

58. Thomas Jefferson, Notes on the State of Virginia (Chapel Hill: University of North Carolina Press, 1955) p. 161. One should not assume from this that Jefferson was a pristine liberatarian. As a noted constitutional historian has written, "historians and biographers have fixed a libertarian halo around the brows of Thomas Jefferson as if he were a plaster saint, a seraph, or a demigod . . . . I find a strong pattern of unlibertarian, even antilibertarian thought and behavior extending throughout Jefferson's long career." Leonard Levy, Jefferson and Civil Liberties: The Darker Side (Cambridge: Belknap Press, 1963), pp. ix, xii. Cited hereafter as Levy, The Darker Side.

59. Jethro K. Lieberman, Understanding Our Constitution (New York: Walker and Co., 1967), p. 107.

60. Oscar Handlin, preface to Levy, The Darker Side, p. vii.

61. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Sources of the Montana State Constitution, prepared by Elbert F. Allen, Montana Constitutional Convention Research Memorandum No. 4 (Helena, 1971), pp. 2-3.

CHAPTER III

ARE STATES' BILLS OF RIGHTS NECESSARY?

There is some question as to the necessity of a state having a declaration of rights at all. This is true despite the fact that one commentator, noting the heritage of bills of rights in American history, has said "undoubtedly, it is un-American even to raise the question of whether a contemporary state constitution ought to contain a bill of rights."[1]

This question can be discussed under, roughly speaking, three headings: (1) the argument that the principle of popular sovereignty assures that the individual will not be denied his rightful civil and political liberties; (2) the contention that the increased applicability of the federal Bill of Rights to the states through the Fourteenth Amendment makes state provisions an unnecessary duplication of existing federal guarantees thereby adding to confusion in the civil liberties area; and (3) the theory that the states should function as the primary enunciators and testers of new rights.

POPULAR SOVEREIGNTY

On the first point, it is suggested below that the principle of popular sovereignty--and this is true of other principles of political theory--is subject to a good deal of misunderstanding and abuse. Arguably, an example of this can be found in the famous series of essays in which three Founding Fathers attempted to secure ratification of the United States Constitution in New York.

In these essays (The Federalist Papers), Alexander Hamilton took the anti-Federalists, who were alarmed over the lack of a declaration of rights in the proposed U.S. Constitution, to task. He argued that a bill of rights in the proposed constitution would be not only unnecessary but dangerous. Hamilton was worried that excepting certain acts out of powers of government that were not even granted would "afford a colorable pretext to claim more than were granted." In other words, Hamilton believed that the federal government had no power whatsoever in the area of civil liberties and that to enumerate certain rights would imply that the newly created government had powers that it was not intended it should possess.[2]

Accordingly, he earnestly believed that "bills of rights had no application to constitutions, professedly founded upon the

power of the people, and executed by their immediate representatives and servants. . . ." and that "in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations." That is, the people were supposedly surrendering no powers over their civil liberties by ratifying the Constitution.[3]

Other Federalists also supported Hamilton's contention, believing that the people hold all power in their hands, that they are cautious in their delegation of it to their servants, and that they hold their servants accountable at frequent intervals for the smallest mal-administration.[4]

Even if this theoretically vigilant citizenry were plausible, the question still would be valid as to how such a body politic would formulate and defend specific substantive and procedural safeguards. In addition, it seems quite clear that without the then-existing state declarations of rights the Federalists would not have been so averse to attaching a bill of rights to their Constitution. In any case, "the public mind found this [the Federalists] reasoning specious" and felt that even those safeguards that were written into the Constitution were inadequate.[5]

Accordingly the public demanded a separate bill of rights to be appended to the Constitution, arguing that precisely because any constitution was

> a great political compact between the governors and the governed, a plain, strong, and accurate criterion by which the people might at once determine when, and in what instance their rights were violated, is a preliminary, without which, this [Constitution] ought not to be adopted.[6]

Now that the federal government exercises considerable powers over the civil liberties area, there is little doubt as to the desireability of a federal Bill of Rights to check the federal government. It would, however, amount to a strange historical reversal to argue that the federal government, which was not originally envisioned as having powers in the area of civil liberties, and its activity in the civil liberties field should suddenly become the reason for excluding declarations of rights from state constitutions.

No state constitution-makers have accepted the logic of a principle of popular sovereignty replacing written guarantees of civil liberties. It seems true, as noted by Robert Rankin, that "nothing is lost and much is gained by having

a statement of the liberties of the people included as a part of the constitution."[7]

FOURTEENTH AMENDMENT AND STATES

It has been noted that, at least during one period in the nation's history, the declarations of rights in the various state constitutions were thought sufficient protection for civil liberties. Thus, the Federalists were found arguing in ratifying conventions that the clamor for a federal bill of rights was a smokescreen, an unnecessary restraint on a power that did not exist and an unnecessary encumbrance in the fundamental law. In the words of Alexander Hamilton, opening the Federalist Papers, "an over-scrupulous jealousy of danger to the rights of the people . . . will be represented as mere pretense and artifice, the stale bait for popularity at the expense of the public good."[8]

Of course, these arguments did not prevail and a federal Bill of Rights was drawn; however, there was still nearly universal agreement among Federalists and anti-Federalists alike that the prime guarantors of civil liberties were the states. No such consensus exists today. More and more, since the mid-1920s the federal government has come to press states, which have become a brake rather than an accelerator in the area of civil liberties.[9]

All the states, not just the oft-scapegoated Southern states, have been compelled to step up their application of rights in substantive as well as procedural areas. For example, David Fox, writing a preparatory report for the recent New York Constitutional Convention, noted that the primary impetus for the badly needed revision of the New York bill of rights was that:

> [M]any of the provisions of the Federal Bill of Rights are now applicable to state action, and the decisions applying these provisions to the states have generally required greater protection of civil liberties than was required under New York decisional law interpreting the comparable New York provision.[10]

His report, in the main, is a discussion of the changes needed to update those provisions in the face of the federal decisions; on his own admission he deals with other state provisions to a lesser extent. Fox's preoccupation with revising the state level guarantees to conform with federally imposed standards

is indicative of the current universally acknowledged backseat status of the states in the civil liberties area. The central vehicle of this federal compulsion is the Fourteenth Amendment to the United States Constitution. Section 1 of this amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws [emphasis added].[11]

Within five years of the ratification of the Fourteenth Amendment, the "privileges and immunities" clause was rendered a practical nullity by a decision of the United States Supreme Court.[12] In the famous Slaughterhouse Cases of 1873, a bare majority of the Court said that to use this clause

> to transfer the security and protection of all the civil rights. . . to the Federal government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States, . . .[and to] constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with these rights. . . [would amount to] a great departure from the structure and spirit of our institutions.

The result, then, of such a federal ascendancy in the area of civil liberties would be "to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore conceded to them. . . ."[13]

Accordingly the Court ruled a privilege terminated by the state of Louisiana--the privilege of pursuing the lawful calling of butchering animals--was one belonging to the citizens of the state as such. Therefore, the security and protection of such a privilege was a matter of state concern and not under the care of the federal government. In these cases the 1873 Court majority did list some privileges and immunities which were enforceable by the federal government. These included, however, only those rights which owed their existence to the federal government: the right of access to the seat of government, the right of federal protection on the high seas, and

so on. The only personal liberties held to be protected included the right of access to the courts in the several states, the right of assembly and the principal procedural remedy, the writ of habeas corpus.[14]

Almost immediately, however, the Court began to expand the list of guarantees protected as "privileges and immunities." These came to include the right to pass freely from state to state, the right of petition, the right to vote for national officials, the right of access to public lands and others.[15] Further extensions of the clause included the right to use municipal streets and parks for discussion of a federal statute,[16] the rights of indigents to migrate from state to state[17] and several others.

Currently the privileges and immunities clause still operates to extend federal protections against state encroachments of civil liberties. However, it is another clause of the Fourteenth Amendment--the due process clause--that operates to the greatest degree to extend federal civil liberties protections. This was not the case immediately after its adoption, however. The Fourteenth Amendment due process clause, it should be noted, is a duplication of a similar clause in the Fifth Amendment which operates as a procedural and substantive check on the federal government. The Fourteenth Amendment provision is (as indicated by the above wording of Section 1) directed explicitly to state behavior.

Early Supreme Court decisions, including the above-mentioned Slaughterhouse Cases, were refusals to apply the clause to alleged abuses in rate regulations by state legislatures.[18] The Court attempted during this time to avoid defining in which cases it would exercise the power of judicial review in ruling on the constitutionality of various state actions. Within six years, however, indications surfaced that the Court would begin scrutinizing every type of state legislation, whether it had primarily a procedural or substantive impact, in any case where essential questions of justice were raised. Justice Mathews made this point in an 1884 Supreme Court case:

> [A]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these

> limitations by our judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of government.[19]

An increasing number of direct appeals to the Court, especially for the adequate protection of property rights against various state efforts at remedial social legislation passed in the face of industrial expansion, led the Court to begin applying the due process clause more vigorously. Using the readily available notion that the states did not have the kinds of powers which they held prior to the Civil War, the Court began the process of overturning the Slaughterhouse Cases, and others, converting the dissents of those cases into majority opinion. In doing so, the Court accepted limited views of the police power of the states, holding that states could pursue only those policies which promoted the public health, morals and safety. Too, such pursuit of public purposes could unreasonably violate the natural rights of persons under state jurisdiction.[20]

The Court then turned its primary attention to writing into this narrowed conception of the state's police power some of the central tenets of laissez faire economics. The prevalence of Social Darwinism in the Court's opinions led to the conception of "liberty" as synonymous with a policy of governmental hands-off in what was conceived to be a "private" economic sphere.

An example of the direction the Court was to take regarding the more personal aspects of the due process guarantees can be seen in a 1923 Supreme Court case. Noting that it had not attempted to exactly define the liberty guaranteed by the due process of law clause, the Court said:

> [T]he term [liberty] has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[21]

In fact, the Court had previously made a similar contention in 1897. In the case Algeyer v. Louisiana, the Court stated:

> The liberty mentioned in [the Fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties. . . .[22]

In 1925, the Court announced, in Gitlow v. New York, that it was prepared to

> assume that freedom of speech and of the press, which are protected by the 1st Amendment from abridgment by Congress, are among the fundamental personal rights and "liberties" protected by the due process clause of the 14th Amendment from impairment by the States.[23]

In this case, the Court upheld a statute forbidding speech advocating the overthrow of the government by violence. In dissent, Justices Holmes and Brandeis argued against such an abridgment, urging that such a ban was improper unless there was a "clear and present danger" that such utterance "will bring about the substantive evils that the State has the right to prevent." This notion, that speech cannot be limited until it becomes effective, will be discussed in a subsequent report on the First Amendment. What is crucial in this case is that the Court finally took what it conceived to be a fundamental personal liberty and declared (if only in dictum) that the federal government could set minimum standards for its enforcement even against states by incorporating it into the Fourteenth Amendment.

Since this initial step, the Court, using varying rationales, has gradually and selectively incorporated nearly all the provisions of the federal Bill of Rights into the Fourteenth Amendment, giving rise to a vast body of case law and making a significant contribution to jurisprudence.[24]

That such a process has been ongoing for nearly fifty years, with reversals of no small magnitude along the way, and that it has been done on a case by case basis--at least until recently--is ample indication of the halting nature of the federal ascendancy in this area. It has never been, and in the foreseeable future probably will not be, the majority doctrine of the Supreme Court that the Fourteenth Amendment

applies the federal Bill of Rights in toto to the states--even though this may be what the Court will accomplish in practice through the gradual and piecemeal incorporation of specific provisions of the federal Bill.

Even if it became accepted doctrine that the federal Bill of Rights and all the federal decisional law on the federal Bill were applicable in toto to the states, the problems of ascertaining in detail what such protections mean would still require a decentralized court system of the kind found at the state level. In general, such an extension would not alter the procedure an aggrieved would follow in seeking judicial remedy for a violation of his civil liberties. If anything it might only destroy one source of the initiative so necessary to the maintenance of existing rights and their extension to meet unforeseen challenges: the state constitution, its provisions on civil liberties, and their case law.

All this supports the contention of one commentator who has written:

> Even if the extent of coverage offered by the fourteenth amendment could be ascertained, we should in our own state constitutions set out the rights that we want protected against invasion by our state government. It has become almost a fixed attitude of mind to look only to the United States Constitution and ultimately to the Supreme Court of the United States, for protection against unreasonable state statutes affecting the citizens of that state. For those who would halt, or at least slow down, the expansion of federal power and who would revitalize state governments, the careful drafting of a state bill of rights to include all liberties which should be guaranteed against state action (even if they may also be protected by the fourteenth amendment) offers a major challenge. If the states cannot protect their citizens' fundamental liberties, or are careless about such protection, then obviously the basic, fundamental vitality of state governments is immeasurably weakened.[25]

In addition, it should be noted that there is considerable dissension over the recent period of judicial activism on the part of the Warren Court and its alleged circumvention of the principles of federalism in its extension of federal civil liberties protections to bind the states.[26] Of course, this means that the federal Court's status as primary guardian of civil liberties may be only temporary--or at least that it may not be definitive. An example of the type of measure that might be taken to curb the Supreme Court's power can be seen

in a proposal made in the middle 1960s by the Council of State Governments. This group suggested that the fifty chief justices of the states should be empowered to sit in review of all Supreme Court decisions which may affect rights reserved to the states or to the people.[27] Regardless of the outcome of this controversy--specific sanctions of the Council of State Governments type do not appear likely--the point is the issues of civil liberties are not nearing any final resolution. The whole area is permeated with more questions than ever will be answered--even if all levels of government vigorously pursued them. As one commentator has said:

> It is not that the horizon has already been reached so that there is no longer any need for the states to look for new frontiers of freedom to conquer. On the contrary, there is much yet to be done in the fulfillment of long-established rights. . . .[28]

Given the fact that even the partial answers of the United States Supreme Court--pressed upon the states through the Fourteenth Amendment--are not clearly acceptable to the public and legal commentators, and adding to this the fact that not all the federal guarantees are binding on the states,[29] the need and potential for a state bill of rights becomes more clear.

If the Constitutional Convention were to decide to exclude certain guarantees from the state's declaration of rights on the theory that they are protected by the federal Bill of Rights, it would want to be certain that such guarantees were in fact protected by the federal document. More important, the Convention would want to be certain that the extent of such protection--as well as the probability that such an interpretation is durable--is in accord with the delegates' beliefs as to what should be the extent of protection of state citizens. Perhaps, since these matters are not subject to clear discernment, the Convention would not want to grant the federal courts the power to interpret the guarantees in perpetuity by default.[30]

To recapitulate: first, there is the obvious historical reversal mentioned above--the state constitutional guarantees predate those of the federal document. States, which were once thought to be the primary guarantors of civil liberties, now find themselves being compelled by the federal government--not only the Supreme Court--to expand their guarantees of civil liberties. This comes at a time when a number of commentators are found castigating the federal government for usurping state functions. Another group of commentators,

however, laments the default of the states in failing to vigorously pursue state functions and thereby necessitating federal intervention. Especially the latter criticism has led the states to reconsider steps to act in order to redress what is viewed as an unhealthy imbalance in the federal system. This brings us to the final, and most important, consideration for a state declaration of rights.

THE STATES AS "LITTLE LABORATORIES"

Basically, the argument goes, the states can function as "little laboratories" in the development and testing of new rights. Several rationales are offered on this point. It is much easier for individual states to set the example for a new right than it is for the state legislatures or the citizenry to set in motion the complex--and, some allege, dangerous--federal amendment procedure. Too, the state, in testing a right in a smaller jurisdiction provides other jurisdictions an example they can assess and adopt or reject.

Seeing this argument, there appears to be no reason why the state should concede the field of civil liberties to the federal courts. What the Supreme Court of Wisconsin said of First Amendment freedoms applies to the whole area of civil liberties: "A state may permit greater freedom of speech and press than the Fourteenth Amendment would require, although it may not permit less."[31] The final, and perhaps best, argument for a strong state bill of rights is the notion that a modern society is entitled to additional guarantees beyond those offered by the two century-old United States Constitution.[32] If one were to accept the federal Bill of Rights as the state model, he would be relying on a partial list of rights which James Madison, their draftsman, was not certain were adequate for his own day, let alone contemporary society.

The above notwithstanding, the "little laboratory" function has, until recently, gone largely unused. This is reflected in comparative data which indicates a low level of state revision activity in the civil liberties area; in fact, one of the limitations of cross-state comparative data in this area is that it only reflects the gradual process by which the states moved out of the civil liberties field. Since the states have only recently and haltingly revitalized their approach, trends in this area are not yet clearly reflected; in short, the potential for state activity is not clear, so little has been tried. This is regrettable; for, as one commentator has written, "in the years ahead, it will be

increasingly necessary for the States in our federal scheme to assume a role of activism designed to adapt our law and libertarian tradition to challenging civilization."[33]

BREVITY, CLARITY, AND THE LENGTH OF THE DECLARATION OF RIGHTS

One other consideration deserves note. A rash of material has been written concerning state constitutions recommending shortening the length of the documents in the interests of brevity, conciseness and clarity. In fact, one of the principal arguments that gave rise to the state constitution revision activity of this last decade was the need to purge statutory material from the states' burgeoning fundamental law. This suggestion, however sensible and even self-evident it may seem, is not without costs and even dangers. This is especially the case with the declaration of rights where one expects to find enumerated the fundamental principles of a body-politic and a healthy list of fundamental rights which even a majority cannot easily trangress. What is crucial in this hazy and complex area of efforts to determine what is constitutional and what is statutory is that it not be used as an argument to abort consideration of difficult and controversial matters. The most fundamental questions are often the most controversial.

An example of the way in which insistence on brevity can lead to omission can be seen in the work of the National Municipal League. Arguing that the Model State Constitution proposed bill of rights is a "sparse" document free of unnecessary rhetoric, the League has offered as a model document a declaration of rights which does not recognize its own incompleteness.[34] That is, the declaration of rights proposed does not contain a provision announcing that the rights listed therein should not be construed to deny, disparage, or impair other rights not listed; there is no Ninth Amendment wording. Omission of such a statement implies that the list is complete. Reference to the essay on Unenumerated Rights in Chapter IX of this report indicates the extent to which such an omission flies in the face of the traditional understanding of the written guarantees of civil liberties. They were frankly recognized as motley lists which needed a statement of the unenumerated rights doctrine to be certain that governments could not decide that the list was complete.

At the same time the League was omitting a statement of the unenumerated rights doctrine in Article I of the Model State Constitution, Article II of that document gave constitutional status to the principle that the state government "should have

all powers not denied by this constitution or by or under the Constitution of the United States."[35] In doing so, the League announced that "the intention here has been to overcome the judicial rule of construction--expressio unius est exclusio alterius--[the expression of one is the exclusion of the other]. . . ."[36] The obvious question is whether this reasoning should not be applied--rather, continue in application--to the guarantees of civil liberty as well as the powers of government. If the principal fear of excessive verbiage in the state constitution is that it may be viewed as a limitation on state governmental powers, the provision mentioned above guaranteeing to the state all essential governmental powers should allay that fear. However, if the fear of excessive wording in the state constitution results in a closed-end bill of rights with no written clause providing for its expansion, delegates should be aware that an essential principle of written guarantees of civil liberties is being discarded.

Clarity, likewise, is a virtue; but it is not an absolute; nor is it necessarily precluded by expounding a point, or a right, at length. That is, a well-drawn provision may be quite long and still maintain clarity throughout its length; in fact, some provisions may need to be written at length to achieve any degree of clarity at all.

Coupling the above with the idea of the states functioning as "little laboratories" for new rights makes the point more clear. To be certain that the precise convention intent is followed in subsequent court interpretations of a newly enunciated right, the constitution-maker may need to set a new right down at considerable length in the interest of being explicit.

CONCLUSION

To sum up: the concept of popular sovereignty is not thought to be a substitute for a specific list of rights; the Fourteenth Amendment does not apply the federal Bill of Rights in toto to the states (theoretically speaking) and even if it did it only sets a floor of minimum standards; the states could take the lead in initiating new rights by incorporating them into their declarations of rights; and, equally important as the rest, a sound declaration of rights is not necessarily a short one.

In conclusion, it appears true, as one writer has said:

> It is scarcely possible to exaggerate the importance of the role to be played by the state Bill of Rights during the next 100 years . . . . To be truly fundamental and meaningful any new Bill of Rights must aim for two goals: (1) preserving that enduring heritage of the past that has served us well, and (2) anticipate the fundamental trends of the future and safeguard human dignity and liberty for that era.[37]

CHAPTER III

NOTES

1. Lester S. Mazor, "Notes on a Bill of Rights in a State Constitution," Utah Law Review 40 (1966): 327. Cited hereafter as Mazor, "Notes."

2. Alexander Hamilton, Federalist Papers (New York: New American Library, 1961) No. 84. Cited hereafter as Federalist Papers. Madison expressed a similar fear. See Chapter II.

3. Ibid.

4. Gordon S. Wood, The Creation of the American Republic: 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), p. 536. Cited hereafter as Wood, The American Republic.

5. Osmond K. Fraenkel, Our Civil Liberties (New York: The Viking Press, 1944), p. 2.

6. John Smilie. Cited from Wood, The American Republic, note 32, p. 541.

7. Robert Rankin, The Bill of Rights (New York: National Municipal League, 1960) p. 4.

8. Federalist Papers, p. 35.

9. Mazor, "Notes," pp. 345-6 wherein it is noted that some of the federal government activity reflected state practice in the civil liberties area.

10. David L. Fox, "New York Bill of Rights: Revision in the Federal System," in New York, Essays on the New York Constitution (South Hackensach, N.J.: Fred B. Rothman and Co., 1966), Chapter II.

11. See Appendix C for full text of the Fourteenth Amendment.

12. Slaughterhouse Cases, 16 Wall. 36 (1873). Cited from Edward S. Corwin, ed., The Constitution of the United States of America (Washington, D.C.: Government Printing Office, 1953), p. 965.

13. 16 Wall. 36, 71, 77-79.

14. Ibid, p. 79.

15. For a list of these, see Twining v. New Jersey, 211 U.S. 78, 97-8 (1908).

16. Hague v. CIO, 307 U.S. 496 (1939).

17. Edwards v. California, 314 U.S. 160, 177-183 (1941).

18. Munn v. Illinois, 94 U.S. 113 (1877).

19. Hurtado v. California, 110 U.S. 516, 536 (1884). It should be noted that in this case the Court was holding that although the due process clause required the states to be "fair" in their judicial procedures, it did not require the states to abide by the standards of the federal Fifth and Sixth Amendments.

20. Loan Association v. Topeka, 20 Wall. 655, 663 (1875), Mugler v. Kansas, 123 U.S. 623, 661. For examples of the converted dissents, see Slaughterhouse Cases, 16 Wall. 36, 116, 122 (1873) (Bradley, J., dissenting opinion) and Munn v. Illinois, 94 U.S. 113, 141-148 (1877) (Field, J., dissenting opinion).

21. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

22. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

23. Gitlow v. New York, 268 U.S. 652 (1925).

24. Over the years, the Court has incorporated the following: From the First Amendment, the establishment clause, Everson v. Board of Education, 330 U.S. 1 (1947); freedom of religion, Cantwell v. Connecticut, 310 U.S. 296 (1940); freedom of speech and press, Gitlow v. New York, 268 U.S. 652 (1925); and the right of assembly, DeJonge v. Oregon, 299 U.S. 353 (1937). From the Fourth Amendment, freedom from unreasonable searches and seizures, Wolf v. Colorado, 338 U.S. 25 (1949), Mapp v. Ohio, 367 U.S. 643 (1961). From the Fifth Amendment, the right against self-incrimination, Malloy v. Hogan, 387 U.S. 1 (1964), Miranda v. Arizona, 384 U.S. 436 (1964). From the Sixth Amendment, the right to a fair, impartial, public trial with the assistance of counsel in circumstances where the Supreme Court considers it essential, Powell v. Alabama, 287 U.S. 45 (1932), Gideon v. Wainwright, 372 U.S. 335 (1963). From the Eighth Amendment, the freedom from cruel and unusual punishments, Louisiana v. Resweber, 329 U.S. 459 (1947).

25. James P. Hart, "The Bill of Rights: Safeguard of Individual Liberty," Texas Law Review 35 (1957): 924.

26. For a beginning in this debate, see J. H. Choper, "On the Warren Court and Judicial Review," Catholic University Law Review 17 (1967): 20 and Yale Kamisar, "On the Tactics of Police-Prosecution Oriented Critics of the Critics of the Courts," Connecticut Law Quarterly 49 (1960): 436.

27. James O. Monroe, "To Preserve the United States," St. Louis Law Journal 8 (1964): 533.

28. Mazor, "Notes," p. 346.

29. For example, the Fifth Amendment right to a grand jury indictment, the Second Amendment right to bear arms, and the Sixth and Seventh Amendments rights to trial by jury are not yet applicable to state behavior.

30. Vern Countryman, "Why a State Bill of Rights?" Washington Law Review 45 (1970): 455. Cited hereafter as Countryman, "State Bill."

31. McCauley v. Tropic of Cancer, 20 Wis.2d 134, 121 N.W.2d 545 (1963). That there exist cases where states have extended the free expression guarantees beyond the federal interpretation has been noted in Miller, "Freedom of Expression Under State Constitutions," Stanford Law Review 20 (January, 1968): 330.

32. Countryman, "State Bill," p. 455.

33. John M. Steel, "The Role of A Bill of Rights in A Modern State Constitution," Washington Law Review 45 (1970): 453.

34. National Municipal League, Model State Constitution, 6th ed. rev. 1968 (New York: The League, 1963, 1968), pp. 25-36. See Chapter IX, essay on Unenumerated Rights.

35. Ibid., pp. 36-38.

36. Ibid., p. 37.

37. Arval A. Morris, "New Horizons for a State Bill of Rights," Washington Law Review 45 (1970): 485-6.

CHAPTER IV

PREAMBLE AND POLITICAL THEORY PROVISIONS

PREAMBLE

> We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do, in accordance with the provisions of the enabling act of congress, approved the twenty-second of February, A.D. 1889, ordain and establish this constitution. [Montana Const. Preamble]

The most debated subject within the Preamble of the Montana Constitution--indeed, one of the most debated subjects within the entire declaration of rights--is the inclusion of reference to God. In the 1884 constitutional convention, delegate Fergus, surely one of the most dynamic personages of that meeting, moved to amend the proposed Preamble by striking mention of the "Great Legislator of the Universe."[1] In a statement supporting his amendment, Fergus, apart from a compelling discussion of the provisional existence of all nations, languages and religions, articulated his opposition to the inclusion of God in the Preamble. He saw it as an encumbrance to the fundamental law and said that, in searching in vain for the benevolent protection of God, he had noticed that "the Engineer asks not God to stay their mad careen but applies the air brakes." Continuing in an opposition of natural law to theological tenet, he noted that "Jefferson in a more superstitious age and the framers of the national Constitution pandered not to popular prejudice" on the issue and that was why the federal Constitution did not mention God in its preamble. However, his amendment was lost and the Convention moved on to consider the declaration of rights proper. At the conclusion of the debate on the declaration article, a motion was made to adopt. Delegate Callaway rose to explain his vote and, after an abrupt exchange with the Chair over his purpose in rising, continued the debate against having "God Almighty running with six-month old calves" in a Preamble "written by some old crank in Massachusetts a hundred years ago. . . ." The final vote on the Preamble was for passage, 33-3.[2]

The 1889 Convention also debated at considerable length the mention of God in the Preamble. Delegate Knowles of Silver

Bow argued that "a religion that would acknowledge Buddha as the fountain of religion would be as appropriate here in this country as the Christian religion."[3] He also noted that atheists were as good citizens as the God-fearing.

Sprinkled amidst statements that the Preamble was merely a matter of taste and that anyone present at the Convention could write one came the arguments favoring inclusion. Delegate Whitehill argued, erroneously, that all cultures "recognize the fact that there is an Almighty God" and, perhaps correctly, that "it is proper in this connection to show our gratitude to the great Creator--to show our gratitude for the blessings of liberty we enjoy."[4] Delegate Maginnis added that he felt

> the reference to the Supreme Power is broad enough to embrace all sects and creeds--even the most advanced advocates of the new scientific thought may be content with it as the formation of a name for the primal energies of the universe, which, in their minds, is the first grand cause of all.[5]

The arguments for inclusion of the mention of God carried by voice vote. A later effort to amend to exclude reference to God was voted down 44-23.[6]

Apart from the somewhat humorous style of debate on this issue, the fundamental question raised does deserve consideration. Does the constitutional recognition of God in the Preamble mitigate against the free exercise of religion and separation of church and state clauses? On this point, Justice Douglas has noted that "freedom of religion should include freedom to be an atheist, an agnostic, or a spiritualist."[7] Contrast this with the applause Delegate Maginnis received when he announced that the atheistic (and perhaps he would have included agnostic) answer to questions of the origin of the universe was unsatisfactory and the crux of the issue surfaces. The arguments phrased in whatever debate occurs on this issue probably also will be utilized in the debate on the separation of church and state.

The Preamble of the Montana Constitution also mentions the Congressional Enabling Act of February 22, 1889, and announces that the state Constitution is ordained and established "in accordance with" that act. Delegate Maginnis, in an unsuccessful attempt to have this provision stricken, said:

"I hold that we establish this Constitution by virtue of the inherent right of the people, and it is not necessary to refer to the Enabling Act of Congress."[8] The fact that the reference was changed from "by virtue of" to read "in accordance with" satisfied Maginnis and sustained its inclusion over further objections.

In commenting on the Preamble, the Constitution Revision Commission subcommittee on the bill of rights said: "The present preamble refers to the Enabling Act, which provides for the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments and to be admitted into the Union, on an equal footing with the original states. This reference is unnecessary."[9]

Apart from the above considerations, the Preamble is a brief and standard introduction to the body of the Montana Constitution. It is a reasonable facsimile of the preamble of nearly every other state constitution. However, some criticism could be made of it as a basically uninspiring statement when compared, for example, with the Preamble of Montana's 1884 document:

> The object of the institution, maintenance and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights and the blessings of life; and whenever these great objects are not obtained, the people have a right to alter or change their form of government, and to take measures necessary for their safety, prosperity and happiness.
>
> The body-politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenant with each citizen and each citizen with the whole people, that all should be governed by certain laws for the common good.
>
> It is the duty of the people, therefore, in framing a constitution of government to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may at all times find his safety in them. We, therefore, the people of Montana, acknowledging with grateful hearts the goodness of the Great Legislator of the Universe, in affording

> us, in the course of His Providence, an opportunity, deliberately and peaceably, without fraud, violence, or intimidation of entering into an original, explicit and solemn compact with each other, and of forming a constitution of civil government for ourselves and our posterity; and devoutly imploring His direction in so grand and interesting a design, do agree upon, ordain and establish the following declaration of rights and form of government as the Constitution of the State of Montana.

In this connection, the recent Illinois Constitutional Convention's Committee on the Bill of Rights proposed a preamble (which was adopted) of somewhat more moderate length designed to preserve the character of the older preamble while adding other phrases that reflect contemporary concerns. Such provisions included the maintenance of an orderly and representative government, the elimination of poverty and inequality, the establishment of legal, social and economic justice, and the full development of the individual. This suggests that some wording reflecting the understanding of the function and purpose of government could be included and could augment the function of the preamble as the source of future thought about the nature of that "body politic" which government is instituted to secure.[10] Some indication of the potential value of a carefully worded preamble can be seen in the following, written by Alexander Meiklejohn:

> We do not understand what a free government is when we interpret its making and administering of laws as merely repressive, as merely limiting the action of men. All the repressive and regulatory activities of the Constitution are incidental and secondary features of a creative, constructive undertaking, namely, that of which its Preamble speaks [emphasis added].[11]

POLITICAL THEORY PROVISIONS

Introduction

The Montana Constitution contains the following provisions which basically are expressions of political theory:

> Art. III, Sec. 1--All political power is vested in and derived from the people; all government of right originates with the people; is founded upon their will only, and is instituted solely for the good of the whole.

> Art. III, Sec. 2--The people of the state have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state, and to alter and abolish their constitution and form of government, whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States.
>
> Art. III, Sec. 3--All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.
>
> Art. III, Sec. 5--All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.
>
> Art. III, Sec. 22--The military shall always be in strict subordination to the civil power; no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, except in the manner prescribed by law.
>
> Art. IV, Sec. 1--The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

There is some question as to the propriety of retaining such statements of political theory in the declaration of rights. The argument for their exclusion goes something like this: statements of political theory are hortatory, generally are not the subject of judicial interpretation and therefore are unenforceable. To include them in a section of the constitution that exists for the sake of some citizen control of government--that exists primarily to be enforced--is to run the risk of undermining the enforceability of the explicit substantive and procedural rights expressed in the declaration.[12] This argument sounds even more plausible if one agrees that the judicial enforceability of the various civil liberties provisions is the main source of their capacity to limit government. While not denying, by any means, the expanding and crucial role the judiciary has come to play in

these matters, most writers indicate that the motor force of written guarantees of civil liberty is a political vitality that is distinct from the deliberative qualities of the judiciary. In general, it is argued that the enforceability and even the interpretation of the guarantees had more to do with the public attitude toward the rights. For example, it is said that even "the Court's authority [in civil liberties matters] ultimately is rooted in the esteem in which it is held by the electorate. . . ."[13]

The provisions of political theory embodied in nearly all state constitutions are phrased in language reflective of the spirit of the seventeenth century Puritan Revolt in England.[14] This is not too surprising, considering that the leaders of the American Revolution were very well read in the history of the English constitution. Their demand for written guarantees of certain civil liberties was a genuinely political--as distinguished from purely legal--insistence that the contemporary understanding of certain rights and principles be made verbally explicit. Moreover, the well-spring of this insistence was precisely in concepts (such as popular sovereignty, inalienable rights and consent of the governed) expressed in the statements of political theory in various English and colonial documents and discussed in the works of various political philosophers. Given the outcome of the colonial insistence (separation from England and a revolution), it becomes clear that there is a closer than imagined relationship between the enunciation of supposedly unenforceable political theories and ideas and the sifting and distillation of these notions into concrete, even commonplace, legally enforceable doctrines.

Two examples of this, taken from the American colonial experience, come to mind. First, the famous expression of the revolutionary period "no taxation without representation" later became the right to vote and gradually was expanded into universal suffrage. It is now accepted as an essential aspect of representative government and has given rise to an almost undigestable body of electoral procedure and law. Second, the development of the notion of separation of powers, traceable to classical antiquity, became the impetus for nearly all the constitutional reforms suggested in the post-Independence period. In addition to this standard tripartite division of powers, the political discussion and critical re-evaluation of the principle culminated in a doctrine of checks and balances. The theory of checks and balances provided, in a way that the traditional separation of powers doctrine never could, the rationale for such inter-branch actions as the executive veto and judicial review.[15]

Perhaps even more significant is the timing of the argument over the possible exclusion of statements of political theory from the fundamental law. The consensus of presumption on these principles within the academic discipline of political science recently has broken down. At the time when serious political theorists are beginning to assess the meaning of certain key political concepts and to question thoroughly the contemporary understanding (or lack of it) of these notions, there is a move to exclude them from the fundamental law. Perhaps this is testimony to a situation "in which certain notions . . . have begun to lose their clarity and plausibility because they have lost their meaning in the public-political reality--without altogether losing their significance [emphasis added]."[16]

In any case, this occurs precisely at the time when a substantial group of political theorists is pointing to a misunderstanding of these principles as a matter of overwhelming contemporary relevance. They argue that the political principles of the American republic need to be re-examined and perhaps given new meaning to match their timeless significance. The words of Archibald MacLeish make the point:

> For a century, and more than a century, the words Jefferson used [in the Declaration of Independence] had worn smooth in men's mouths. The actual meaning had left them. They went from hand to hand like coins whose inscriptions all men recognize and no men read or see. But now in these dangerous years, when every preconception, every easy understanding, has been questioned by brutality and violence, the words take shape again, and taking shape, take meaning. Gradually out of the darkness of this time the image of the world Jefferson imagined gathers light and assumes the form it had to him and his contemporaries.[17]

The point is not that the Jeffersonian world is in resurgence; rather, it is that the principles of political order, for some time taken for granted, are beginning to gain new meaning.

Several state constitutions admonish a frequent recurrence to fundamental or first principles as a revitalizing force of political understanding and as necessary to the preservation of the spirit of liberty. Typical wording of this type of provision is that of Chapter I, Article 18 of the Vermont Constitution:

> That frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the blessings of liberty, and keep government free: the people ought therefore, to pay particular attention to these points, in the choice of officers and representatives, and have a right, in a legal way, to exact a due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the state.

Certainly, the first place to which one might recur to determine the first principles is the state's fundamental law, especially the declaration of rights where, within the colonial tradition, they are robustly stated. This is the case when the language of the Declaration of Independence is used to explain and justify certain political expressions and actions. And, on this point, one might recall the fact that the legitimacy of the U. S. Constitution rests squarely on the basically "hortatory" Declaration of Independence. No one would think of relegating this document to secondary status--because it was not judicially enforceable--even though it may be of great relevance that its language and meaning have "worn smooth" while still being universally cited.

It is a commonplace that at certain times bodies politic are given to reassess their foundations--their fundamental assumptions about the nature and meaning of public life under a certain set of institutions. This is, in fact, a continuing preoccupation of political philosophy and armchair political discussions in general. It is the point of calling a constitutional convention. Accordingly, the function of a constitution as a source of public understanding is not limited to judicial interpretation. The written constitution, particularly the declaration of rights, does not exist only to enunciate certain procedural rules, institutional frameworks and substantive rights. It is also a document that announces some of the central concerns and principles of the constitution-makers and the political body they constitute; as Jefferson said, "even though written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people; they fix too for the people the principles of their political creed."[18]

The point is made more explicitly by a more recent commentator on bills of rights:

> Courts have frequently declared laws unconstitutional because they were contrary to some provision of a bill of rights. Judicial decisions have been made based upon their clauses. On the other hand, there are certain types of contents in bills of rights which were never intended to be used as bases for judicial decisions.[19]

This commentator also cites Jameson's well-known treatise on Constitutional Conventions which offered the following tenative definition of the term "bill of rights:"

> A Bill of Rights consists of solemn declarations of abstract principles, relating to the origin, ground, and purposes of government, and practical injunctions and prohibitions, promulgated with a view to its safe and equitable administration, digested out of the experience of the free people of England and America during six hundred years of struggle for constitutional liberty and intended as at once a guide and a limitation in the exercise of power.

Jameson went on to say, in a statement more relevant to these considerations, that he had called

> these principles . . . abstract, but only in deference to the common forms of speech, which thus characterize whatever is viewed as disconnected from the circumstances of time and place. Properly considered, however, those principles are the most concrete of all, as being such, not simply under certain conditions, but irrespective of all conditions [emphasis added].[20]

For these reasons, and the desire to make more explicit the values and reasoning underlying the safeguard of certain liberties and the constitution of a certain frame of government, provisions of political theory are found at the beginning of nearly all written constitutions. What follows is an exploration of the traditional understanding and current vitality of some of the principles of political theory contained in the Montana Constitution.

Purpose of Government

The purpose of government, the ultimate justification for establishing by fiat a certain institutional structure, has

been the object of study and discussion since the earliest times. The concern of this brief essay is the colonial constitution-makers' understanding of this purpose and its subsequent reflection in the statements of principle embodied in state constitutions; implications of such a governmental purpose also can be outlined in a way that suggests the potential of a political theory provision which expresses a paramount concern rather than a justifiable right. At the outset, it can be said that governments were theoretically instituted by the colonists to serve only certain limited ends.

Gordon Wood has written that "the sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution. . . ." This republican ideology both presumed and helped shape American's conception of the way their society and politics should be structured and operated--"a vision so divorced from the realities of American society, so contrary to the previous century of American experience, that it alone was enough to make the Revolution one of the great utopian movements of American history." Wood goes on to say that "given the nature of American society, [this was] . . . a desperate attempt by many Americans to realize the traditional Commonwealth ideal of a corporate society, in which the common good would be the only objective of government [emphasis added]."[21] At that time, the tenets of Whig republicanism, while not denying the existence of localized, particular interests, regarded them as aberrations at best and perversions at worst.[22]

Such an understanding of the purpose of government is at least as old as Plato. But the greatest stress placed on that type of conception, outside of the colonial period, was in the writings of St. Thomas Aquinas in the thirteenth century. For Aquinas, the very idea of law presupposes the common good. "Law, strictly understood, has as its first and principal object the ordering of the common good."[23] The notion of common good is found elsewhere too; even Thomas Hobbes invoked it, admittedly with a view to the good of his theoretical Leviathan, an indivisible and overbearing sovereign.[24]

Another view of the purpose of government can be seen in the writings of Thomas Jefferson. Supporting the notion that government is a means, and not an end, and that it is instituted to serve only certain purposes, he wrote, in the Declaration of Independence: "to secure these rights, Governments are instituted among men . . . ." Later in life he wrote: "The equal rights of man and the happiness of every individual are now acknowledged to be the only legitimate objects of government."[25] In general, the object of government was, for

Jefferson, the protection of pre-existing, Creator-given rights, which all men enjoy under the natural law.[26]

At first glance, the above two rationales for the institution of government appear quite reconcilable; indeed, individual liberty and the common good were easily reconcilable to most of Whig ideology in the nineteenth century. "Even at the beginning, however, there were some good Whigs who perceived the inherent conflict between individual liberty and traditional republican theory."[27]

Some pointed to ancient Sparta, for example, to argue that the private pursuit of wealth in property was inimical to republicanism. Noting a "sad dilemma in politics," it was argued that to limit the pursuit of wealth in the name of republicanism's central tenet, the common good, was to destroy liberty. ("[T]here can be no true liberty without security of property. . . ." said a 1775 issue of the Philadelphia Pennsylvania Packet, "and where property is secure, industry begets wealth; and wealth is often productive of a train of evils naturally destructive to virtue and freedom. . . !")[28]

In his perceptive writing (in 1830) on certain aspects of American society, Alexis de Tocqueville spoke to a related point. He noted that a central predisposition of Americans was a commitment to the individualistic life style. He went on to say that this life style

> disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and his friends, so that after he has thus formed a little circle of his own, he willingly leaves society at large to itself.

Tocqueville coupled this with another trait he observed in the American character--"a passion for physical gratification"--and added that Americans believe "that their chief business is to secure for themselves a government which will allow them to acquire the things they covet and which will not debar them from the peaceful enjoyment of those possessions which they have already acquired." More important, he also wrote of the political consequences of these two traits: "[M]en who are possessed by the passion of physical gratification generally find out that the turmoil of freedom disturbs their welfare before they discover how freedom itself serves to promote it." He warned that at the rumor of such turmoil, and if any public commotion intruded into the "petty pleasures of private life," the "fear of anarchy" triggered the American readiness "to fling away their freedom."[29]

This notion of the increased propensity to privatization of concern in American life claims more adherents than de Tocqueville. Although they do not always engage in sweeping analysis of the kind quoted above, contemporary political theorists alternately acknowledge and lament such a turn away from questions of the public good and ascribe it to various causes, necessity and deprivation being among them.[30]

Without going as far as the above-described tension in the American political climate may deserve--it was, after all, the central issue Americans had wrestled with since the seventeenth century--the point seems to be that there was some (perhaps not successful) effort in the early American experience to point the society to an elusive "public good" at the expense of private, essentially personal, interests.[31]

Perhaps an interesting American political history could be written dwelling on this tension between the desire to frame a set of institutions which would enable the public body to pursue the public good and the simultaneous tendency for that very public to be drawn off in the concerns of wealth, property and eventual corruption. In any case, such was and promises to be one of the central tensions of American political development.

The insight of Jean Jacques Rousseau of the eighteenth century was that "the only legitimate government is that where 'the public interest governs', where the public thing (res publica) is felt to be the common concern of all."[32] That the vision of the American Revolution was to accomplish this good is reflected in the statement of Thomas Paine that "the word republic means the public good, or the good of the whole. . . [his emphasis]."[33] It also is reflected in constitutional provisions of the type adopted (arguably rubber stamped) by the Montana Constitutional Convention of 1889 and contained in nearly all state constitutions.[34]

Article 10, Part First of the New Hampshire Constitution states in part:

> Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men. . .

Article III, Section 1 of the Montana Constitution provides, to the same point: "All government . . . is instituted solely for the good of the whole."

The implications of such a notion are obvious and its place in the fundamental law perhaps a bit more clear. The principle that the common good is the sole justification for founding a state operates as a gauge of the authority and legitimacy of governmental institutions in particular and of society in general.[35]

Popular Sovereignty

Indications of the principle of popular sovereignty are at least as old as the establishment of the Athenian democracy in the fifth century B.C. As noted in Chapter II, there occurred at that time a transition in the terminology and understanding of the concept "statute." The new term, nomos, based the statute's validity on its ratification of principles acceptable to those who were obligated to obey it.[36] The principle is expressed in the Montana Constitution's Article III, Section 1: "All political power is vested in and derived from the people; all government of right originates with the people. . . ." Section 2 of Article III also contains the principle: "The people of the state have the sole exclusive right of governing themselves. . . ." Casual reference to popular sovereignty can also be found in state statutes. The open meeting law [Revised Codes of Montana, 1947, Sec. 82-3401] provides:

> It is the intent of this act that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them . . . [emphasis added].

Special emphasis was placed on the principle of popular sovereignty during the colonial period of American history. The meaning of popular sovereignty can perhaps best be indicated by a brief look at that period's understanding of the principle.

By 1775, John Adams' idea that the people were the "Source of all Authority and Original of all Power" was not a novel expression. In fact, both the advocates and opponents of forceful separation from England were appealing to the people as their ultimate justification. In the turmoil of the period, there was less concern with questions such as who were "the people," what institutions expressed their will, and how; the main point was that the principle was universally invoked, clear meaning aside.[37]

Thomas Jefferson was one of the leading exponents of the principle of popular sovereignty. His writings--mostly in letters--abound with various statements that government was founded on the will of the people. In a 1793 cabinet opinion, Jefferson wrote that "the people who constitute a society or nation" are "the source of all authority in that nation...." In a 1792 letter he wrote: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation substantially declared." And in an 1819 letter, he wrote: "No government can continue good but under the control of the people."[38]

Support for the principle of popular sovereignty was much more widespread than the anti-Federalist persuasion with which Jefferson became associated. In fact, the Federalists themselves turned out to be the leading exponents of the sovereign power of the people. For example, James Wilson, the leader of the Federalist ratification effort in Pennsylvania, said:

> In all governments, whatever is their form, however they may be constituted, there must be a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable. The only question is where that power is lodged.[39]

The English jurist, Sir William Blackstone, in his famous Commentaries had placed the absolute sovereign in the will of the legislature, in the power of Parliament. Wilson noted that some Americans had tried to deposit the supreme power in the state governments. But, according to Wilson, although recognizing the supreme power of the state governments was closer to the truth than placing that power in the legislature, "in truth, it remains and flourishes with the people." That is to say, the supreme power did not rest with government at all, federal or state. "It resides in the people, as the fountain of government."[40] In later writings Wilson again stressed that "the supreme power is in [the people]; and in them, even when a constitution is formed, and government is in operation, the supreme power still remains." Popular sovereignty, as conceived of by the Federalist persuasion was, then, a power that could never be alienated or surrendered.[41]

Neither the Federalists nor the anti-Federalists were clear on all the implications of an extended principle of popular sovereignty; often times the principle was invoked in grandiose terms so its implications could be ignored. In one instance dealing with one aspect of the principle of popular

sovereignty, however, most colonial political leaders were agreed. That colonial accord over the right of revolution is reflected by the fact that it was stated in a number of the state's declaration of rights and, of course, in the Declaration of Independence--a document which itself announced a revolution.

The right also is contained in the Montana Constitution. Article III, Section 2 provides:

> The people of the state have the sole and exclusive right . . . to alter and abolish their constitution and form of government, whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States.

One commentator, noting that the statement of the right of revolution is an adjunct to the concept of popular sovereignty, sees that it "might seem radical to more conservative delegates, and there might be a suggestion of some toning down of this declaration." But, he adds: "Such a change would, of course, make no difference in the people's ultimate power."[42] Another writer attempts to distinguish between two types of rights to alter government. In an article adjudging the compact theory of government as still viable, Stephen J. Perello, Jr. argues that a person has "a civil right to alter government constitutionally" and a "natural right to alter or abolish government unconstitutionally." He goes on to say that to recognize the "latter natural right would impair those ends which the constitution is instituted to attain."[43] This distinction is, however, subject to the criticism that it is convenient but not quite to the point. Although it can be granted, as announced in a famous post-Civil War case involving the state of Texas,[44] that the Union through the act of constitution looks to its own perpetuity, it must also be admitted that the constitution does not see itself as an end in itself. In fact, constitutions and governments, in the American conception, view themselves as means. It is perhaps healthy that the provisionality of a governmental form be announced to shed some light on the principle of the primacy of the public will over the established institutions. Such a declaration does not contradict the statement contained in the Declaration of Independence:

> Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed.

Further clarification of this point would take one far afield; it is sufficient to note that the constitutional recognition of rights, which on their face seem disruptive of the ends of the constitution itself, is not uncommon. A further example of this point is found in Article 10, Part First of the New Hampshire Constitution which reads, in part: "The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind." The implication of this type of provision is that there is a kind of healthy commotion which accompanies the persistent efforts toward social and political justice and that this commotion serves well the ends a constitution pursues by adding vitality to the means of its realization.[45]

As one commentator has written, the colonists were much closer to a major political event than contemporary Americans; their respect for public vigor was reflected in constitutions which tended "to be somewhat more robust" than the later constitutions.[46]

Inalienable Rights

The American commitment to the written document as the assurance that basic rights would be protected is a matter of record.[47] At the same time, however, statements abound to the effect that inalienable rights and liberties were

> not annexed to us by parchment and seals. They are created in us by the decrees of Providence which establish the laws of nature. They are born with us; exist with us; and cannot be taken from us by any human power, without taking our lives. In short, they are founded on the immutable maxims of reason and justice.[48]

The inalienable rights are thus held to be prior to government and not subject to any governmental power.

The same point can be seen in the positions taken by Federalists Alexander Hamilton and Philip Livingston in answer to the Tory assertion that since the New Yorkers had no charter, they had no rights. Both denied that "the sacred rights of mankind" were "to be rummaged for, among old parchments or musty records." They also denied an assertion, made even now, that "any right . . . if it be not confirmed by some statute law, is not a legal right." Putting rights to parchment did <u>not</u> create them; it only <u>affirmed</u> their existence;

not only that, but even the repeal or annihilation of the document which enumerated the basic rights could not (in the words of James Otis) in any way "shake one of the essential, natural, civil, or religious rights of the colonists."[49]

The commitment to the written document contrasted with the assertions that such rights were not created by the written document indicates some confusion in the Colonial mind about the nature of law. Did the colonists' use of a written constitution--a peculiarly American pastime in the eighteenth century--signify an acceptance of the modern understanding of law as a command which is limited only by specific, written rights and constitutional principles? That is, are the rights of men discoverable only in the gaps of the law as those gaps are created by specific written controls? On this point, the colonial understanding was fairly clear. There was common recognition that since the law could be de jure (by law) as well as de facto (in fact) unjust, to rely on some conception of the intrinsic justness of the law was insufficient. What was necessary was that these rights, deduced from self-evident conceptions of equity and justice, be protected not as a final attainment of some heavenly freedom, but as a continued bulwark against the excesses of authority. Therefore, it was to further protect them that the rights had to be "specified and written down in immutable documents."[50] That these rights are discoverable beyond the limitation of the temporal law was also a commonplace colonial understanding; again in the words of Jefferson, they were discoverable in "the laws of Nature and of Nature's God." However, he also recognized that the effort to secure the rights necessitates that they be distilled and written in some form in the fundamental law for all to see.

The consequences of this ambiguity over the function of the written law was carried into the Revolution. Implicit in the American resort to a written fundamental law was the commitment to the notion of statute law as being created by legislative enactment. However, understanding of political obligation was quite keen and

> they were never willing to acknowledge that the "obligation of the ruled to obey" depended "solely upon, Be it enacted, etc." and thus continued to retain something of Otis's conviction that "righteousness should be the basis of law." From the time in 1646 when the Massachusetts General Court declared that the fundamental basis of all laws is the law of God and right reason and that "if anything hath been

> otherwise established, it was an error, and not a law . . . , however, it may bear the form of law," such a belief in the morality of law had been the central part of the Americans' legal history in the New World.[51]

That the claim to these rights was not a function of the extent of the statutory law is also indicated by the use of the word "inalienable." If a right is inalienable, it is not the kind which a temporal government can grant or take away. Such inalienable rights were not part of the social contract "bargain:" government could at best secure them, but it could provide no substitute for them or impetus to trade them away. To make the point more clear, one might recall the distinction Kant made between "value" and "worth." In Metaphysics of Morals he wrote that

> everything has either a value or worth. What has value has a substance which can replace it as its equivalent; but whatever is, on the other hand, exalted above all values, and thus lacks an equivalent, . . . has no merely relative value, that is, a price, but an inner worth, that is, dignity.[52]

Kant's typically amazing insight sheds some light on the understanding of the concept of inalienable rights. It is not that the rights could not be transferred without the individual's consent, but that their nature made them fundamentally untransferable in any case.[53] In the sense of the Kantian distinction, they had worth as opposed to value.

Short lists (such as Jefferson's) of the most basic inalienable rights, seemingly so broad as to find the approval of all, have a long history of evolving in the name of a number of political positions in heated conflicts and controversies. They also have many implications which are far beyond the bounds of this report. What is certain is that only the tip of the iceberg is seen in such constitutional expressions as that in the Montana Constitution [Art. III, Sec. 3]:

> All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.

Such a provision indicates, but does not sum up, the continuing struggle to protect the somewhat elusive rights which no government legitimately transcends.

Consent

The most famous statement of the principle of the "consent of the governed" is to be found in the Declaration of Independence where Thomas Jefferson wrote that governments derive "their just powers from the consent of the governed." As one commentator has written, "if that consent be lacking, governments have no just powers."[54]

Because the term "consent of the governed" (like others such as "liberty," "freedom" and "civil rights") is ambiguous, its mere invocation may mean very little if there is no understanding of the meaning one invokes. In fact, the invocation may be a mask for the common "negative pregnant" wherein one begins by embracing a principle so he can abuse it at will. As indicated in the introduction to this chapter, much of the work currently being done in the area of consent theory is an effort to take the term as more than a slogan and, taking it seriously, to attempt to discover its meanings. What follows is a brief look at some of this contemporary work.

Two examples of contemporary consent theory are especially interesting in that they argue that consent of the governed is systematically undermined by a kind of "engineered" or "manufactured" consent. According to one text, the ideal of consent of the governed "as it was propounded in our political folklore, has meaning only where consent is freely and independently given by rational, public-spirited citizens."[55]

The authors go on to say that the dominance of interest group politics, the prevalence of compromise between partial interest claims in the determination of policy (as opposed to a pursuit of the public good indifferent to partial claims) and the refinements of psychologically manipulative techniques in political advertising--"the selling of the president"--all add up to a chronic split between the beliefs of traditional democratic faith and contemporary political practice.[56] A similar point is made by Robert Pranger in discussing the "manufacturing of consent"--an occurrence he judges to be a part of the "politics of power," not the "politics of participation."[57]

In light of the prevalence of those kinds of arguments, it may be helpful to outline briefly the colonists' understanding

of consent to indicate whether the principle is still operative as they understood it. To come to even the most tentative conclusion on the point is not a matter of indifference if consent is really the source of all legitimate governmental powers.

One of the arguments offered by persons of Tory bent for the continued adherence of the colonies to the Crown was that the colonists' claim that they were being taxed without representation was erroneous. As the argument went, the interests of the colonists were represented in Parliament--the colonists were "virtually" represented. Supposedly, they were represented by virtue of the fact that each member of Parliament was a representative of the whole British nation and its colonies. In arguing that they should be represented actually, and not merely virtually, the point was raised that "a supposed or implied assent of the people is not an assent to be regarded or depended on."[58]

Since consent through representation was important in the history of the unwritten British Constitution, the colonists felt the same protection should be theirs; they should have the rights of Englishmen, including the right to vote for their own representatives. The thrust of the colonial effort to give meaning to consent then, was to make it more explicit in its manifestation and more particular in its origin. And the main measure of the extent of consent was seen to be the extension of the right to vote to a public-spirited populace.

That the contemporary situation is a good deal different has been noted by a number of observers of the American political climate. To say that the public spirit of the colonial period has been lost is commonplace.[59] As this was at the root of the colonial emphasis on explicit consent as the source of governmental legitimacy, something may very well be missing in the contemporary meaning and operation of the principle. This can be seen without going into the implications of an active principle of consent by returning to the allegations of "engineered" consent.[60]

The heart of such allegations is that the use of the modern Madison Avenue public-relations firm in a periodic effort to sell the image of a political candidate (just as commercial advertising and mass communication sell breakfast cereals and fastback cars) may operate to cheapen the integrity of political dialogue. If, as is charged, commercial advertising is less information-imparting and more jingle-oriented and repetitive half-truth, the extension of its practices and attributes into the political world may serve to render the

vote to a status where it has little meaning. The electorate then loses its essential republican function as a genuinely deliberative tribunal and becomes a stimulated, image-conscious mass to be titillated at varying intervals, the result being called "consent."[61]

Whether the methods of mass advertising are appropriate for the marketplace is not the question. But, as Joseph Tussman has said in strong terms:

> [O]ur attempts at education for democracy, for participation in public life, are hopelessly perplexed by the divergent demands of marketplace and tribunal. How, for example, shall we teach our children to communicate with the necessary respect for the integrity of language, and for each other, when we support (almost as cultural heroes) a large class of professional liars to hail with impartial sincerity the claim of any client? . . . How, supporting such a profession, can we really make the point that the integrity of communication is the wellspring of a community's life? It is no answer to say that we have learned to defend ourselves by not believing what we hear, or that propaganda will counter propaganda and the truth will prevail even though no one tells it. We are poisoning the wells, and we cannot live on antidotes [emphasis added].[62]

Packaging products for appeal may be appropriate in the marketplace; but, the tribunal--the place where deliberation and not the image is most important--is a different matter. Such an observation is not new. For example, Kurt Riezler found illustrations of "engineered" consent as far back as the writings of Homer and Thucydides.[63] Jean Jacques Rousseau, writing nearly two hundred years ago, lamented that the prospects for a free, democratic society were diminished by the fact that "the arts of pleasing have been developed into a system. The question is no longer whether a man is honest, but only whether he is clever."[64] That is, the moulding of a pleasurable image using the techniques of mass advertising may do the concept of democracy and the concept of meaningful consent a good deal of damage. Such a commitment to the "profile" and not the "courage" makes the candidate's deep convictions irrelevant. In doing so, it could call into question the central concept which for centuries has been said to define the legitimacy of governmental power: the consent of the governed. Whatever the status of this principle, the

above perhaps offers an example of the possibilities for serious practical and theoretical work on one of the central principles of traditional democratic theory.

In the last analysis, perhaps, the challenge in the theory and practice of consent of the governed is that "we must determine in what sense a free man, a free society, does practice self-direction. What, then, is the difference between a political system in which men do govern themselves and a political system in which men, without their consent, are governed by others?" And, perhaps it is no less true that "unless we can make clear that distinction, discussion of freedom of speech or of any other freedom is meaningless and futile."[65]

The Montana Constitution supplies this question, but not its answer, with its variant of the notion of consent of the governed in Article III, Section 1: "all government of right . . . is founded upon their [the people's] will only. . . ."

Free and Open Elections

The Montana Constitution also contains a provision announcing the principle of free and open elections. Article III, Section 5 provides: "All elections shall be free and open, and no power, civil or military shall at any time interfere to prevent the free exercise of the right of suffrage."

Unlike the other political theory provisions, there was some disagreement over the wording of this statement in the 1889 Convention. One delegate argued that the words "and open"--apart from the fact that they "really add no force to the section"--might render the use of the secret ballot unconstitutional. Delegate Bickford responded that the use of the Australian ballot did not preclude an open election. He interpreted the word open to mean that "the polls should be open to all persons who are legally entitled to vote," that they should be opened "to all persons who, under the laws of this Territory and the United States, are entitled to the right of franchise." After delegate Robinson agreed, delegate Warren rose and supported the effort to amend out the words "and open." He perhaps did not understand the subject at hand, for he urged

> it is about time we had an election in this country that is free and not open. We have had enough of open elections in this country; and if this clause in this

> Constitution is for the purpose of doing away with or making a dead letter of the Australian System, which is now on our statute books, the sooner we know it the better.[66]

In any case, the section was passed with the "free and open" wording intact and the limited right of suffrage was placed in the state constitution.

Nearly half of the states have similar provisions. Some also contain provisions calling for frequent elections. For example, Article I, Section 9 of the North Carolina Constitution provides: "For redress of grievances and for amending and strengthening the laws, elections shall be often held." Section 10 of the same constitution provides that "as property rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office." Discussion of this and other types of restrictions on the right of suffrage can be found in the Montana Constitutional Convention Commission study on suffrage and elections.

Separation of Powers

All of the first constitutions in the original colonies contained provisions for the establishment of a tripartite system of government; six of them specifically distributed the powers of government to the three branches of government now taken for granted: legislative, executive and judicial.[67]

The Maryland Declaration of Rights, Section 6, was typical of the early declarations of the principle: "That the legislative, executive, and judicial powers ought to be forever separate and distinct from each other." The roots of this notion go back at least to Polybius's discussion of mixed forms of government in antiquity, but the more systematic discussions of the principle took place in seventeenth century England. Consistent with their desire to isolate (or rather, extricate) the legislative functions from the prerogative of the Crown, English radicals developed the principle during the Revolution and the interregnum. John Locke, sometimes overcredited as the inspiration of the Declaration of Independence, continued the discussion of separation of powers in a vague manner. By the early eighteenth century, it was a prime subject of English polemics.[68] The modern development of the doctrine of separation of powers was due, however, not so much to the English radicals or early writers as the work of the Frenchman Baron de Montesquieu. As one writer has said,

> we should look in vain [to the medieval period] for any abstract definition or vindication of the characteristic constitutional model which we associate with Montesquieu and his school. . . . It was a political theory . . . which would have appeared entirely unintelligible to the medieval mind.[69]

Montesquieu's influence on the American Revolution was as strong as that of Rousseau on the French. One of the central notions of Montesquieu's work, The Spirit of the Laws, was that a proper foundation for political freedom rested on the correct distribution of power. In his effort to show that power and freedom were to be combined in the public sphere, he announced the famous, if now forgotten, principle of separation of powers: that only power arrests power. In this light, the principle of separation of powers is a mechanism at the heart of government through which additional power is generated without being able to monopolize and usurp the other centers of power.[70] This, then, is one of the operative principles of the notion that the power must be exercised as well as restrained.

The Founding Fathers placed much emphasis on the problem of balancing powers as they set out to constitute a new center of governmental power. James Madison referred to it as "a first principle of free government." John Adams' entire political thinking revolved around the principle. However, state governments during this time were apparently not too concerned with a real division of governmental functions. At the end of a long struggle to isolate the legislature from the corrupting influences of the royal governors, the idea of separation of powers had yet to reach its full significance at that level of government.

Critics soon saw that the broad principle that required each branch to independently pursue its respective functions could be applied by any branch against any other; that is, a principle originally designed to protect the legislature from the executive branch could also be used by the executive to assert its own prerogative against the legislature. It was at this point that the oversimplistic meaning of separation of powers--that each department should be distinct--was modified by the inclusion of the principle of checks and balances. And it was from this discussion of the necessity for more vigorous interdepartmental checks that such additional powers as the governor's limited veto of legislative actions resulted.

The principle of separation of powers as stated in Montana (and other state constitutions) reflects the older understanding of the concept. It is worded to insure distinctness of functions of the various departments and does not reflect the notion of checks and balances. Article IV, Section 1 of the Montana Constitution reads:

> The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution directed or permitted.

Certainly there is plenty of room for the courts to interpret the words "properly belonging" so as to permit one branch to exercise functions which some may conceive to belong to another; and, the provision does leave the Constitution ample room to delegate any powers to whatever branch suited the Constitution-makers. It is also true that tradition to a certain extent limits the delegation of powers to certain fairly well-understood patterns. For example, one might not expect the Constitution to permit the executive to determine the amount of appropriations, although it could authorize such an executive power as a line-item veto over specific appropriations. Still, the principle of public checks and balances is not explicitly stated.

As noted above, this problem of checks and balances had its origin in the writings of Montesquieu and was specifically applied in the context of American constitution-making. The division of powers, admirably extended by the men of the American revolution, is in the main an answer to the question "how can power be controlled, yet still exercised?" The answer to the question, that only power arrests power, is suggestive of the continuing vitality of the principle.[71] The core of the notion of separation of powers seems to be that the exercise of power in a public way by one center of governmental power checks the exercise of power by another center of power.

In the contemporary period, there is considerable writing to the effect that the notion no longer has--if it ever had--a corresponding reality in the practical political world. For example: "The attempt to represent government as a triangle of equal and opposing forces, or as any other simple geometrical figure, is clearly inadequate and misleading."[72] Surreptitious ties between the executive and the judiciary--

suggested in the recent Fortas controversy--are said to threaten the independence of the judiciary and therefore the principle of separation of powers. In addition, it is argued that overt ties between the party in power in the legislature and the governor (as titular head of that party) tend to mitigate against the executive branch effectively checking the legislature. This was perhaps quite predictable. For example, as Judge Cooley pointed out nearly ninety years ago, "executive power is so intimately connected with legislative that it is not easy to draw a line of separation. . . .[73]

Without denying the value of an independent judiciary--surely more vigorously upheld than other features of the separation of powers in spite of the fact that even Montesquieu held that "the judiciary is in some measure next to nothing"[74]--or the value of an autonomous legislature, it should be remembered that the principle of the distinctness of the branches was modified early in the American experience in order to permit the effective centers of power, conceived at that time strictly along branch lines, to publicly check one another. "The interaction of the various departments is indeed relied on in part to keep them independent."[75]

From the increasing contemporary discussion of the principle of separation of powers, one thing seems clear: the future status of the principle seems to depend less on distinctness of the traditional branch lines--that may be myth forever--than on the public qualities of the arresting interception within and without the branches.

> [I]t is not that there is always a clear-cut distinction between the functions of legislation and administration, between the legislative, executive, and judicial 'powers'. Nor is it supposed that the functions should be distributed in any perfectly systematic way to different organs.[76]

An example of the possible contemporary application and simultaneous extension of the principle of checks and balances between departments can be seen in the case of the expansion of the executive bureaucracy. Commentators writing on this phenomenon in general agree that the immense growth of the executive branch (to unmanageable proportions which necessitated nationwide some form of "executive reorganization") is in large measure the result of the delegation to the executive of essentially legislative powers. It also has been noted that the court effort first to curtail, then to demand specific standards in the delegation of such powers has in the main, ceased.[77] An example of this court effort can be

seen in the cases where the Montana Supreme Court ruled on the constitutional status of the Legislative Council.[78]

Given the commonplace assertion that the previous tripartite distinction of legislative, executive and judicial powers is no longer realistic--witness "quasi-legislative" and "quasi-judicial" functions--perhaps the best course to follow would be to consider ways in which checks not only between but also within these traditional branches could be set up with a view to maximize the public exposure of state government. One suggestion of this type--dealing specifically with the executive branch--is explored below in the essay on Safeguards in Administrative Procedure. What appears essential, regardless of the current status of the principle of separation of powers, is that "if the principle of government with the consent of the governed has a substantial foundation, there is need for effective limitations on all public officials."[79] The ultimate concern here, then, is the public quality of the enduring and essential tensions between centers of power.

This is not to suggest limitation on the capacity of government to function but only that it function properly, in a public way. Nor is it to suppose that state government is merely a hotbed for corruption whose main need is to be restrained; for, as Montesquieu noted in what is, on reflection, an astonishing insight, even virtue stands in need of limitation.[80] What is crucial is that, whatever pattern the allocation of functions takes, the checks and balances between the centers of power should operate to expose--and in that way make responsible--the operations of those centers of power.

Provisions on the Military

Quartering of Troops

Nearly every state constitution has a provision prohibiting the quartering of troops in private dwellings. Article III of the United States Constitution states that "no Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." The Montana Constitution gives verbatim expression to this principle in Article III, Section 22. This statement reflects a problem that extended far beyond the period of the American Revolution. The principle was expressed as a complaint in the English Petition of Right of 1628:

> And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people. . . .[81]

The practice of quartering troops was especially marked in the late 1760s in the colonies. In 1765, General Gage secured the passage of a Quartering Act to aid him in the enforcement of the Stamp Act and the Revenue Act of 1764. That is, the quartering of troops was an instrument used to compel by force or threat of force obedience to laws which were, in the words of John Adams, "taxation without representation." The Quartering Act provided that if there was a shortage of barrack units for the British Army, and all ale houses were likewise filled, the governor and council of a colony could authorize the quartering of the troops in private buildings. A later Quartering Act (1774) was listed by the colonists as one of the Intolerable Acts--one of the British abuses which led to the Declaration of Independence. The practice it authorized was also cited as one of the major grievances in the Declaration and Resolves of the First Continental Congress.

The principle of no quartering of troops is now well-established and seems to be of little relevance today. However, the enunciation of such a principle is a sign of the pervasive colonial mistrust of the military and the colonists' desire to prevent the potential abuses with which they knew standing armies threatened society.[82]

Civilian Control of the Military

As noted above, one of the most pervasive of colonial understandings was the danger of the military to political liberty. In addition to the commonplace provisions prohibiting the quartering of troops, two provisions were incorporated in several state constitutions of that period; examples can be found in Part First, Articles 25 and 26 of the New Hampshire Constitution of 1784. Article 25 states that "standing armies are dangerous to liberty, and ought not to be raised, or kept up, without the consent of the legislature." Such a provision may seem irrelevant to the contemporary period in which huge outlays for defense are considered necessary for nation-state security. However, to the colonists--and to a number of contemporaries--the principle had an important justification.

The English Bill of Rights of 1689 had a provision which required the approval of Parliament before a standing army could be maintained. This was an effort to wrest the control of the military from the not exactly civilian hands of the king. The standing army was employed for a number of decidedly political purposes; for example, James II raised a large standing army, staffed it with Catholic officers, and stationed it near London as an unpleasant reminder to the Parliament. The colonists too had good reason to consider the freedom from the oppression of standing armies as a fundamental "right of Englishmen." As stated in the Declaration of Independence, one of the offenses necessitating separation from England was that the king "has kept among us, in times of peace, Standing Armies, without the Consent of our legislatures." This statement was picked up by the Virginia Bill of Rights of 1776 and was followed in the other colonies. During the struggle for the ratification of the U.S. Constitution, restrictions upon the authority to maintain standing armies in times of peace were proposed by five of the ratifying states. These proposals were not adopted as the Constitution provided that control of the raising of armies rested with Congress. In this case, and in the previous case of Elbridge Gerry's Convention proposal that a limit should be set on the number of troops which could be maintained, it was felt that the Congress could be trusted to prevent any abuses.[83]

Whatever uneasy consensus existed during the colonial period over the ability of Congress to effectively prevent abuses in the size of standing armies no longer exists today. As one commentator has written, a study of the detailed consideration given by the Founding Fathers to the problems of standing armies and civilian control of the military "reveals that the military structure presently existing in the United States, which depends primarily upon direct conscription of citizens into the federal army, fails to meet the standards established by the framers of the [U.S.] Constitution of 1787."[84] In recent years, the ethic of preparedness which grew out of the American experiences in World War I and II and the exigencies of the Cold War has come under some scrutiny. Particularly at issue is the amount of preparedness: the point at which it might destroy the virtues it was instituted to protect; the pursuit of preparedness; the question of just how we might extricate ourselves from its logic, and the legitimate uses of such a capacity once it is assembled.

Article 26 of the New Hampshire Constitution states in commonplace wording the concept of civilian control of the military: "In all cases, and at all times, the military ought to be under strict subordination to, and governed by, the civil

power." Such language can also be found in the Montana Constitution. Article III, Section 22 (in addition to the prohibition on quartering troops) provides: "The military shall always be in strict subordination to the civil power...."

Of course, the contemporary concern over these principles is essentially directed toward the federal government and, more specifically, the military appropriations approved for the Department of Defense. That the principle of civilian control of the military also has application at the state level can be seen in a 1914 Montana court case, In re McDonald.[85] This case resulted from several habeas corpus petitions by persons alleging they were unlawfully detained. On September 1, 1914, the governor proclaimed Silver Bow County to be in a state of insurrection and placed it under martial law. In accordance with the order, military forces of the state took possession of the county. The habeas corpus petitions were filed by several who alleged they had been "arrested without warrant, were being held without bail to be tried without a jury, before an alleged court or tribunal set up by the military authorities, upon charges to the petitioners unknown. . . ."[86]

On the other hand, the respondents argued that preventive detention was authorized under the Governor's Proclamation. Justice Sanner, writing the court opinion, ruled that the governor had no power to proclaim absolute martial law and that any suspension of habeas corpus was a legislative function. In addition, the court ruled that in an instance where some form of martial law was declared, the duty of the military was to reopen courts of the jurisdiction. The military authorities themselves had closed several of the courts of the county in this instance.[87] In ruling thus the state court indicated that a continuing effort was necessary to determine the proper place of the military power as subordinate to the civil authority.

NOTES

1. Montana, Constitutional Convention of 1884, "Proceedings," unpublished, 26th day, February 8, 1884. Cited hereafter as "1884 Proceedings".

2. Ibid.

3. Montana, Constitutional Convention of 1889, Proceedings and Debates of the Constitutional Convention (Helena: State Publishing Co., 1921), pp. 543-44. Cited hereafter as 1889 Proceedings.

4. Ibid., pp. 92-3.

5. Ibid., p. 94.

6. Ibid., p. 249.

7. William O. Douglas, The Right of the People (Garden City: Doubleday and Co., 1958), p. 143.

8. 1889 Proceedings, p. 91.

9. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Constitutional Provisions Proposed by Constitution Revision Commission Subcommittees, Montana Constitutional Convention Commission Occasional Paper No. 7 (Helena, 1971), p. 35.

10. Illinois, Constitutional Convention 1970, Committee on Bill of Rights, Synopsis: Proposal No. 1 (Springfield, 1970), pp. 9-11.

11. Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (New York: Oxford University Press, 1965), pp. 163-4. Cited hereafter as Meiklejohn, Political Freedom.

12. For examples of this reasoning, see the recently proposed constitutions of New York and Maryland and the National Municipal League, Model State Constitution 6th ed. rev. 1968 (New York, 1963, 1968), pp. 27-28.

13. E. F. Roberts, "The Right to a Decent Environment: Progress Along a Constitutional Avenue," Law and Environment, ed. Malcolm Baldwin (New York: Walker and Co., 1970), p. 138.

14. Although there is some variance, the state constitutions generally express the doctrine of popular sovereignty, the origin and purpose of government, consent of the governed, the inalienable rights of men and the separation of powers. Most states spell out, in language reminiscent of the Declaration of Independence, an adjunct of the doctrine of popular sovereignty, the right of revolution.

15. Gordon S. Wood, The Creation of the American Republic: 1776-1787 (Chapel Hill: University of North Carolina Press, 1969), pp. 150-162. Cited hereafter as Wood, The American Republic. See also discussion on Separation of Powers later in this report.

16. Hannah Arendt, Between Past and Future (New York: Viking Press, 1961), p. 101. Cited hereafter as Arendt, Between Past and Future.

17. Julian P. Boyd, The Declaration of Independence: The Evolution of the Text (Princeton: Princeton University Press, 1945), front flap. For the general tendency of the new political theorists' reassessment of old verities, see for example Philip Green and Sanford Levinson, eds., Power and Community: Dissenting Essays in Political Science (New York: Random House, 1970).

18. Thomas Jefferson, Letter to Joseph Priestley, June 19, 1802. Cited from Saul Padover, ed., Thomas Jefferson on Democracy (New York: New American Library, 1939), p. 153.

19. Leila Roberta Custard, Bills of Rights in American History (Los Angeles: University of Southern California Press, 1942), p. 31. Cited hereafter as Custard, Bills of Rights.

20. John A. Jameson, A Treatise on Constitutional Conventions, p. 92. Cited in Ibid., p. 9.

21. Wood, The American Republic, p. 53.

22. See, for example, Theophilus Parsons, Essay Upon Government, cited from Ibid., p. 59.

23. Quoted from Alexander Passerin d'Entreves, The Notion of the State (Oxford: Clarendon Press, 1967), p. 223. Cited hereafter as Passerin d'Entreves, The State.

24. Ibid., p. 228.

25. Letter to A. Coray, October 31, 1823. Writings, Vol. XV, p. 482. Cited from Edward Dumbauld, ed., The Political Writings of Thomas Jefferson (New York: Bobbs-Merrill Co., Inc., 1955), p. XXV. Cited hereafter as Dumbauld, Writings of Jefferson.

26. Ibid., p. xxvi.

27. Wood, The American Republic, p. 64. Alexander Passerin d'Entreves, has discussed the difficulty of reconciling John Locke's statements that, on the one hand, government is founded for the public good, and, on the other, that it is instituted to protect certain "rights" and "interests." See Passerin d'Entreves, The States, p. 224.

28. Wood, The American Republic, p. 65.

29. Alexis de Tocqueville, Democracy in America. Cited from Mason Drukman, Community and Purpose in America (New York: McGraw-Hill Book Co., 1971), p. v.

30. See, for example, the writings of Robert Dahl, Hannah Arendt and Michael Parenti, among others.

31. The "elusive" nature of the public good is noted by one commentator who has written that, just as there is "an ever-recurring desire to establish once and for all a substantial criterion for justice," so is there a desire to "establish once and for all the notion of the common good, a substantial criterion which should enable us to say, in any given circumstance: 'This, and this along, is what ought to direct, and what justifies, the use of power.'" See Passerin d'Entreves, The State, p. 222.

32. Ibid., p. 228.

33. Wood, The American Republic, p. 55.

34. The political theory provisions, like nearly all other provisions in the Montana Constitution, were borrowed verbatim from the Colorado document and were adopted without debate.

35. Passerin d'Entreves, The State, p. 228.

36. Martin Ostwald, Nomos and the Beginnings of the Athenian Democracy (Oxford: Clarendon Press, 1969), p. 55.

37. Wood, The American Republic, pp. 329-30.

38. Cited from Dumbauld, Writings of Jefferson, pp. 79, 80, 92.

39. Quoted from Wood, The American Republic, note 17 at 530-1.

40. Quoted from Ibid., p. 530.

41. Ibid., p. 600.

42. James P. Hart, "The Bill of Rights: Safeguard of Individual Liberty," Texas Law Review 35 (1957): 919.

43. Stephen J. Perello Jr., "The Current Validity of the Compact Theory," Constitution Revision Study Documents (Baltimore: State of Maryland, 1968), p. 12.

44. Texas v. White, 7 Wall. 700 (1868).

45. For a recent statement of this common colonial assumption, see Howard Zinn, Disobedience and Democracy (New York: Random House, 1968), p. 124.

46. Vern Countryman, "Why a State Bill of Rights?" Washington Law Review 45 (1970): 471.

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48. [John Dickinson], "An Address to the Committee of Correspondence in Barbardos . . . ," (Phila., 1776), Ford, ed., Writings of Dickinson, p. 262. Cited from Wood, The American Republic, p. 293.

49. Ibid., pp. 293-4.

50. Ibid., p. 293.

51. Ibid., pp. 295-6.

52. Ernest Cassirer, Rousseau, Kant, and Goethe (New York: Harper & Row, 1967), p. 11.

53. Staughton Lynd, Intellectual Origins of American Radicalism (New York: Random House, 1968), p. 45.

54. Meiklejohn, Political Freedom, p. 8. The notion of government by consent is at least as old as the Funeral Oration of Pericles. See also Passerin d'Entreves, The State, p. 229.

55. John C. Livingston and Robert G. Thompson, The Consent of the Governed (New York: The MacMillan Co., 1966), p. 11. Cited hereafter as Livingston, Consent.

56. Ibid.

57. Robert J. Pranger, The Eclipse of Citizenship (New York: Holt, Rinehart & Wilson, Inc., 1968), pp. 43-45. See also Howard B. White, "The Processed Voter and the New Political Science," Social Research 28 (Summer 1961): 127. Cited hereafter as White, "Processed Voter." For a series of opposing positions see "The 'New Political Science' Re-examined: A Symposium," Social Research 29 (Summer 1962): 127-156.

58. Cited from Wood, The American Republic, note 38, p. 181.

59. See, e.g., Arendt, On Revolution (New York: Viking Press, 1965), pp. 221-3.

60. An example of the writing devoted to a serious conception of active consent is Michael Walzer, Obligations (New York: Simon and Schuster, 1970).

61. Joseph Tussman, Obligation and the Body Politic (London: Oxford University Press, 1960), pp. 106-8.

62. Ibid., p. 108.

63. Kurt Riezler, "Political Decisions in Modern Society," Ethics 64 (Jan. 1954): 8. Cited from White, "Processed Voter," p. 128.

64. Livingston, Consent, p. 26.

65. Meiklejohn, Political Freedom, p. 11.

66. 1889 Proceedings, pp. 98-9.

67. John A. Fairlie, "The Separation of Power," Michigan Law Review 21 (1922-3): 397. Cited hereafter as Fairlie, "Separation of Power."

68. Wood, The American Republic, p. 150.

69. Passerin d'Entreves, The State, p. 91.

70. For this and other insights on the philosophical preoccupations of the personalities of the American Revolution, see in general Arendt, On Revolution.

NOTES

71. Arendt, On Revolution, p. 149.

72. Fairlie, "Separation of Power," p. 434.

73. Judge Cooley, Constitutional Limitations, 5th ed. (Boston: Little, Brown and Co., 1883), pp. 105-6.

74. Fairlie, "Separation of Power," p. 433. See also Malcolm Sharp, "The Classical American Doctrine of Separation of Powers," University of Chicago Law Review 2 (1934-5): 385. Cited hereafter as Sharp, "Separation of Powers."

75. Sharp, "Separation of Powers," p. 386.

76. Ibid., p. 385.

77. Charles Reich, Bureaucracy and the Forests (Santa Barbara: Fund for the Republic, 1961).

78. See Mitchell v. Holmes, 128 Mont. 275, 274 P.611 (1954) wherein the Court ruled that the creation of the Legislative Council violated the principle of separation of powers. The Court reversed itself in State v. Aronson, 132 Mont. 120, 314 P.2d. 849 (1957).

79. Fairlie, "Separation of Power," p. 434.

80. Montesquieu, The Spirit of the Laws, Chapter XI, 4 and 6. Cited from Arendt, On Revolution, p. 150.

81. Petition of Right, June 7, 1628, Section VI. Cited from Richard L. Perry, Sources of Our Liberties (Rahway: Quinn and Boden Co., Inc., 1959), p. 70.

82. Ibid., p. 72.

83. Ibid., pp. 230-1.

84. Leon Friedman, "Conscription and the Constitution: The Original Understanding," Michigan Law Review 67 (1968-69): 1493.

85. 49 Mont. 454, 143 P. 947 (1914).

86. Ibid., p. 458.

87. Ibid., p. 476.

CHAPTER V

RIGHTS OF EXPRESSION AND SUBSTANCE

This chapter discusses several specific issue-areas closely associated with free expression: the right of association, the problem of the loyalty oath, and, in response to increasing concern over the openness of government, the right to know. An additional substantive right--the right to bear arms--also is explored. The traditional First Amendment freedoms are discussed in another report in this series; that report emphasizes the divergent character of those rights from the essentially negative liberties common to bills of rights.

ASSOCIATION

In his classic study of the American political climate Alexis de Tocqueville stated:

> In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects, than in America. Besides the permanent associations, which are established by law, under the names of townships, cities, and counties, a vast number of others are formed and maintained by the agency of private individuals.[1]

Arguing that the association--the "natural privilege of man"--has as its function in America to "argue and petition," "attacking those [laws] which are in force, and . . . drawing up beforehand those which ought to be enacted," Tocqueville continued:

> There are no countries in which association are more needed, to prevent the despotism of faction or the arbitrary power of a prince, than those which are democratically constituted . . . . The right of association therefore appears to me almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the foundations of society . . . . at the present time, the liberty of associations has become a necessary guaranty against the tyranny of the majority.[2]

The federal Bill of Rights is silent on the rights of associations. As a Hawaii sudy noted, it may be that the Founding Fathers had so great a fear of the factional

tendencies of associations that the omission of their mention was more than mere oversight; this is especially the case in the Federalist Papers No. 10.[3] It is also true, however, that the weight of this paper in which James Madison castigated factions is often overestimated: "It is sometimes as if the title of the work is Number 10, and the sole author was James Madison."[4] Beyond this, the fact that so little time was spent drafting the Bill of Rights adds credence to the contention that the exact framer intent on the question of associations cannot be known.[5] In any case, many commentators have noted and applauded the tendency of Americans to "join" for whatever frivolous, innocuous or crucial purposes. As stated by historian Henry Steele Commager:

> No one familiar with American history can doubt that the private voluntary association is the most basic of American institutions, for it is the institution that underlies almost all others . . . . Most of our reforms . . . have been carried through by just such organizations--many of them regarded as disreputable or subversive by their respectable contemporaries. Call the list of those reforms that have given the United States its most distinctive character over the past century and a half and you will discover that almost all of them had their inception in, and were carried to completion by, associations of individuals.[6]

The problem of the unpopularity of an association deserves digression. Nearly every type of association at some time has been regarded as subversive. The dissenting churches of the seventeenth and eighteenth centuries suffered social and legal indignities at the hands of established institutions.[7] The history of the labor unions of the eighteenth and nineteenth centuries is written with an undue emphasis on the violent aspects of the movement that is only recently being placed in perspective. In fact, the crux of the association problem arises when an unpopular or allegedly subversive association is acted against by the majority or the agencies of the government. This can be readily seen in the cases affecting the right decided by the Supreme Court.

In spite of the constitutional silence on the right of association, it is a right protected by the First and Fourteenth amendments to the United States Constitution.[8] The Supreme Court first announced the constitutional right of association in a case involving the National Association for the Advancement of Colored People. The association, active in the early civil rights movement in the South, was harassed by a requirement that it turn over its membership lists to

governmental officials. The court, seeing the obvious abuses of such a practice, held in NAACP v. Alambama[9] that the "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." In addition, the court announced the applicability of the right of association to the states, saying:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment . . . . State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny . . . .[10]

The court also stated the freedom to associate was broad enough to incorporate all human advocacies, and that it was unimportant whether the beliefs to be advanced were of a political, economic, religious or cultural character.

The view that the right of association is protected by the First and Fourteenth amendments--which asserts that the right is cognate with the First Amendment guarantees of speech, press, assembly and petition--may miss the point somewhat. It has been noted by at least one commentator that the right of association is not a mere synonym for these other First Amendment guarantees; rather, it is a separate protection with its own implications.[11]

That is not to say, however, that the sphere of First Amendment protections is not important to the right of association. In fact, the right of association enjoys the preferred status accorded the other First Amendment freedoms.[12]

In sum, it is certain that "the right of association is central to any serious conception of democracy."[13] Without this right, the individual could not function politically in the contemporary big states. It also has been written that "there is no question of substitution by mass communications" for the rights of association: "Neither can the role of private government be performed by newspapers and television" of modern times.[14] Modern communications notwithstanding, most people still find some of their identity in some form of group activity. "It follows that government has an obligation to protect the rights of association from invasion . . . ."[15]

That a state may have some difficulty defining the precise limits of a substantive right of association cannot be denied. However, the state constitution provides an opportunity

for such delineation. Incorporation of the substantive right of unrestrained freedom of association into the substantive rights provisions is an alternative. The Puerto Rico Constitution contains an example of wording to protect the right of association in Article II, Section 6: "Persons may join with each other and organize freely for any lawful purpose, except in military or quasi-military organizations." A Hawaii report noted that protection of the Supreme Court-enunciated right of association could be added to First Amendment-type wording as follows: "No law shall be enacted . . . abridging the freedom of speech, of association, or of the press . . . ."[16] Alan Westin, noted expert on the right of privacy, has proposed a similar provision: "The right to privacy of persons, communication, and association shall not be abridged."[17]

THE LOYALTY OATH

The problem of the loyalty oath--that which "has made men's fortunes and hurt their lives, brought fame and shame, comfort and resentment"[18]--to secure certain benefits, privileges and positions is not new in Montana. In fact, the problem arose when the first territorial legislature convened in Bannack, December 10, 1864.[19] The first step in organization required by Congress was for all members of both houses to take the "iron-clad oath" of allegiance to the Union. Although the territorial council (senate) was predominately Democratic, the oath was taken with "little delay or grumbling." This was not the case in the house, however; the Madison County delegation was quite bitter at the prospect. The governor at first attempted gentle persuasion, which had no effect. Then he dropped all hints and announced that if there were no oath, there would be no pay. According to the Montana Post of December 24:

> That touched the Madison County delegation in a tender place, and with such wry faces as a patient makes who takes distasteful purgatives, and such contortions as one would make after over-eating turkey buzzards, they swallowed the "iron-clad."[20]

This was not the end of the matter, however, as John H. Rogers of Deer Lodge still refused to subscribe the oath. He asserted that, as he had fought as a lieutenant in Price's army, he could not honestly say he had not taken up arms against the Unites States. Accordingly, he offered a substitute oath which the house accepted; the governor refused to accept it, however. In addition, the governor refused to address the assembly until that assembly was "organized in pursuance of law." That is, he refused to deliver a state of the state message until Rogers subscribed the oath.[21]

The two houses were angered by the governor's rebuff and passed a resolution addressed to the "school marm." According to one source, the legislators "threatened all sorts of things. They would tell the voters; they would tell Congress; they would tell Abraham Lincoln; but the governor 'hummed his tune and cracked his jokes.'" The upshot of the matter was that John Rogers resigned from the assembly.[22]

The 1889 Constitution, perhaps applying a lesson learned from the territorial experience, provides in Article XI, Section 9 that "no religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student . . . ." Notwithstanding this provision, the Revised Codes of Montana, 1947, contain an oath requirement for teachers nearly identical to the one declared unconstitutional in a 1964 U.S. Supreme Court case, Baggett v. Bullitt (see below).[23] Sections 75-4706 and 75-8805 require the following oath of every teacher in the public school and university system:

> I solemnly swear (or affirm) that I will support the constitution of the United States of America, the constitution of the state of Montana and the laws of the United States and the state of Montana, and will, by precept and example, promote respect for the flag and the institutions of the United States and the state of Montana, reverence for law and order and undivided allegiance to the government of the United States of America.

A fight developed in the 1971 Legislature when it was unsuccessfully proposed that this oath for public school and university teachers should have to be subscribed prior to the signing of the contract.[24] The opposition to making the oath a condition precedent to the signing of contract was based on recent U.S. Supreme Court decisions rendering similar loyalty oaths unconstitutional. [As this report went to print a Montana federal district court declared the Montana teachers loyalty oath unconstitutional (December 30, 1971).]

The Montana Constitution also contains in Article XIX, Section 1 a general oath for all legislative assembly members and state officers. This oath, probably constitutional, amounts to swearing (or affirming) to support, protect and defend the United States Constitution and that of Montana, to discharge official duties with fidelity; in addition, one forswears any financial irregularities to obtain his position or perform any act. The section concludes: "And no other oath, declaration or test shall be required as a qualification for any office or trust."

Currently, there is no doubt as to the unconstitutionality of any religious test or oath as a precondition to holding public office. In 1961, the U.S. Supreme Court struck down such an oath, saying that it "unconstitutionally invades the appellant's freedom of belief and religion . . . ."[25] The other type of oath, the central concern of this essay, is the political oath generally associated with some form of government loyalty-security program.

Article VI of the Unites States Constitution requires that members of the three branches of the federal government affirm their support of the federal Constitution. This practice is fairly common, with more than forty state constitutions requiring some kind of oath in exchange for certain benefits. Coupling this with the fact that states which have revised their constitutions recently have generally provided for the administration of some form of political oath, it can be seen that the oath is fairly popular, as well as common.

The popularity of the practice notwithstanding, there is considerable debate over the use and abuse of different types of loyalty oaths. Insofar as the matter has been reviewed by the Supreme Court, the tendency has been to analyze the wording of the oath to see if it meets judicially construed constitutional standards. This can be seen in the early case of the Washington state oath, which reads as follows:

> I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and the State of Washington, and will, by precept and example promote respect for the flag and the institutions of the United States and the State of Washington, reverence for law and order and undivided allegiance to the government of the Unites States.

One commentator has written that "the oath seems harmless enough." He goes on to say that many very honest citizens refused to take the oath, being wary of hidden meanings in the language and possible application of such an affirmation.[26] In 1964, the United States Supreme Court ruled that such an oath--nearly identical to Montana's statutory oath--was unconstitutional because of its vagueness.[27] The court, in ruling the oath unconstitutional, posed several questions which may be asked of nearly every kind of loyalty oath. Which of society's institutions must one respect? What kind of respect is to be required? What sorts of criticisms are permitted? How must one support the constitution?

In a later case, the Supreme Court moved toward the abolition of all loyalty oaths. A number of instructors at the University of Buffalo had refused to take a New York loyalty oath. Just before the challenge to this oath was to go to trial, a law was passed rescinding the requirement that the oath be subscribed. In its place, prospective teachers were to be notified of certain sections of New York's Education Law, one of which, for example, forbade them from uttering "seditious words." The Supreme Court struck down this law, noting the stifling effect of such an effort to curtail free speech. This, the court said, was especially the case when the strictures were applied to the academic realm where freedom of thought and speech were the prerequisites of any viable concept of education.[28]

One writer has said that "most loyalty oaths now are unconstitutional, either because their words are too vague or because they are too broad . . . ."[29] If any form of loyalty oath is still judicially acceptable, it probably would have to be of the kind which announces only support of the Constitution and the laws of the entity administering the oath. Examples of this type of oath can be found in the 1968 Model State Constitution. Section 1.07 reads:

> No oath, declaration or political test shall be required for any public office or employment other than the following oath affirmation: "I do solemnly swear [or affirm] that I will support and defend the Constitution of the United States and the constitution of the state of_____and that I will faithfully discharge the duties of the office of_____to the best of my ability."[30]

In any case, interesting discussions of the underlying rationale of political loyalty oaths have taken place in the realm of political philosophy. Howard B. White has written that, "as there is a quality of loyalty in political inquiry, there is also a quality of non-loyalty."[31]

White's point is perhaps one of the most compelling inquiries into the questions of loyalty and the administration of loyalty oaths. By non-loyalty, he does not mean disloyalty; the two, he insists, must be distinguished. White notes that all inquiry begins with a certain detachment from the prevailing political institutions. Although all free societies require gratitude, as do even some unfree societies, inquiry, which does not destroy or deny such gratitude, at least constitutes a certain abstention from it. That is, a detachment from the patriot's gratitude--one who is grateful to those who establish

and preserve the political order--is essential to the free play of the critical faculty of wonder, the prerequisite of critical inquiry.[32]

White points to the various sources of a "loyalty" doctrine in American political thought. It can be found in the reference to "light and transient causes" in the Declaration of Independence; in the Forty-ninth Federalist where the author admonishes that frequent appeals to the people would imply a defect in the Constitution; in the famous case of Marbury v. Madison and in the political doctrines of Abraham Lincoln. Of this tradition, White says that "all serious political writing regards loyalty as a political good."[33]

He also points to the sources of the concept of "non-loyalty"--again, a concept that must be distinguished from disloyalty. This sentiment can be found in the whole tone and temper of the Declaration of Independence; in the reservations of Federalist Alexander Hamilton about the absolute goodness of the Constitution; in the desanctification of the Constitution which Jefferson admonished, and in the writings of Calhoun, Beard, Dewey and Roger Williams, among others.[34]

White's point on the conflicting tendencies of these two principles, both firmly rooted in the tradition of American political discourse, seems to be that the concept of loyalty, as expressed in the typical verbal loyalty oath, has been bent out of recognition in a way that endangers the function of inquiry as detachment from conformity. Not only does he cite the traditional arguments against the loyalty oath, but he also warns of the tendency of loyalty oath campaigns to "enlist converts against conversion."[35]

Particularly where such an oath can be suspected as an attempt to curb dissent, its claim to be a verbal affirmation of the democratic tradition rings hollow. If the effect of such an oath is to slow willingness to fervently dissent, nowhere could it be more damaging than precisely at the point where it is most frequently required: from those who are publicly chosen to critically inquire into and examine the nature of the society--the public officials.

Typical of the arguments offered in support of loyalty oath programs is the contention that the state has a compelling interest in attempting to isolate and eliminate those whose beliefs are irregular or "subversive." Rebuttal to this point centers around the indefiniteness and historical abuses of the concept "subversive" and, more important, contends that in a system of free

expression, denying a person certain benefits because of his beliefs, speech, or associations fundamentally does not follow.[36] Another argument offered in support of political oaths is that persons who do not subscribe to the basic beliefs upon which the government of the United States is founded are not deserving of certain privileges. It can be seen that this argument is problematic, given the depth and sometimes even contradictory nature of the tradition out of which conventional beliefs have arisen. In fact, it is the variegated nature of this tradition--and the conflicting nature of the beliefs which emerge from it--which add depth to what otherwise would be a stale source of inspiration and political inquiry.

Other arguments center around the notion that a combination of various factors--the cold war, fear and chauvinism--has created a peculiar kind of support for political loyalty oath programs. This argument goes on to contend that the elimination of oath programs could result in the institution of some much harsher program of restrictions based on loyalty considerations. Against these contentions it is argued that none of these factors--the cold war, fear, and chauvinism--offers a justified basis for strictures in an area so potentially sensitive to the field of civil liberties and freedom of belief and expression. This is especially the case when it is noted that the history of civil liberties is replete with examples of minority agitation that furthered civil liberties guarantees now assumed as commonplace. In addition, if the current loyalty oath program is on the borderline of serious constitutional difficulties, certainly any harsher program would cross that line and be deemed unconstitutional.

Perhaps the most telling question asked of the proponent of the loyalty oath is "what is the application of the oath?" How is a violation of the oath clearly decided? Having determined this, what are the sanctions against one who allegedly committed the violation? An example of the problems encountered--apart from such occurrences as resignation of Assemblyman Rogers in the first Montana territorial legislature--can be seen in the recent case where the Georgia legislature refused to seat a duly-elected representative. Julian Bond was a member and officer of a civil rights organization which issued a statement criticizing United States government policy in Vietnam and the Selective Service laws; Bond publicly endorsed the statement. Even before the Georgia house convened, its members challenged Bond's right to be seated. A special committee of the legislature, appointed to exercise the traditional legislative function of judging the qualifications of its members, concluded that Bond did not support the constitutions of the United States or of the state of Georgia, that he was giving comfort to the

enemies of the Unites States, that his statements violated the Selective Service Act, that his statements would bring disrespect and discredit to the Georgia house of representatives, and that, accordingly, he ought not to be seated. Bond sought injunctive relief and a judgment that the house action was improper and that it violated his right to free expression under the First Amendment. Two members of the three-judge federal district concluded that the action of the Georgia house was proper; however, a unanimous U.S. Supreme Court reversed the decision. In doing so, the court held that Bond's freedom of expression was indeed violated.[37]

Although this case did not directly involve a loyalty oath per se, it did involve a political judgment as to what certain persons believed to be loyal. The difficulties encountered with such a judgment and any attendant sanctions are clear: one risks violating a person's right to speak strongly on controversial matters. In this case, a legislative committee violated the constitutional rights of a duly-elected public official to speak strongly on critical issues of society.

In this area, the debate can be protracted and difficult. The only counsel in dealing with questions of this sort, amenable as they are to blind appeals of all sorts, is a careful guard that the prejudices which so often block critical consideration of a complicated question do not write the final decision.

Returning to White by way of conclusion:

> A political inquiry may end in absolute skepticism, in despair, in complacent acceptance of what we have; but it can never begin there. It must begin in wonder. Wonder as to what we have is in some critical respects different from what we have. He would be a poor Fourth of July orator who wondered at democracy, but he would be a poor political philosopher who began his inquiry by praising democracy.[38]

It is suspected that the paramount issue in the area of loyalty oaths, as popular and widespread as they still are, is: Do demands of loyalty oaths tend to supplant non-loyalty, the "healthy antidote to the kind of loyalty that can be identified with conformity?"[39] Or, phrased differently, is the loyalty oath an effort to curb critical political inquiry?

Finally, in democracies where the public life always operates with a healthy kind of uneasiness, does the effort of a loyalty oath to verbally bolster the confidence of those who do not value that uneasiness serve a justifiable end? Is the administration of such oaths a justifiable effort to ferret

out "subversives," or is it the act of "joining with one hunter in pursuit of another, or arguing over which definition of liberty is the wolf's and which is the sheep's, forgetting that there is such a thing as a shepherd"?[40]

RIGHT TO KNOW

A long-standing principle of democratic theory has been that the activities of government be public at all levels. This openness, it is held, provides the necessary basis for principled scrutiny of and objection to government activity.[41] Such concern was reflected in the 1641 Massachusetts Body of Liberties. Section 39 of that document provides that

> every Inhabitant of the Country shall have free libertie to search and veewe any Rooles, Records, or Regesters of any Court or office except the Councell, And to have a transcript or exemplification thereof written examined, and signed by the hand of the officer or the office paying the appointed fees therefore.

Commenting on this principle more than a hundred years later, Patrick Henry said that "the liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them . . . ."[42]

James Madison spoke to the same point in an 1822 letter:

> A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance: And the people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[43]

Thomas Jefferson also wrote on this principle, saying "the basis of our governments being the opinion of the people, the very first object should be to keep that right . . . . The way to prevent [errors of] the people is to give them full information of their affairs . . . ."[44]

That such a concern is still at issue is indicated by the recent test case activity between the Lee Newspaper and the Montana State Industrial Accident Board over the disclosure of certain files. The problem is also a matter of concern at the federal level. As one commentator has written:

> Lest it be forgotten that this concept of publication of government action remains less than fully executed, "a general philosophy of full agency disclosure" by the federal government required the adoption of a public "right-to-know" law in 1966.[45]

This statement is in reference to the 1966 federal Freedom of Information Act. What follows is a brief examination of that act, a discussion of state statutes on the matter and a mention of possible activity in this area at the level of the state constitution.

The federal Freedom of Information Act of 1966 (FOI) was a result of increasing awareness in Congress that the federal Administrative Procedures Act was being used to support withholding of information.[46] Strong pressure from the press and concerned individuals led to the FOI amendment to the Administrative Procedures Act in an effort to mandate full agency disclosure subject to clearly defined exemptions. A Senate report states that the FOI Act was designed as a disclosure statute, not as a withholding statute.[47]

The terms of the act specify that identifiable agency records must be made available to any person; this general requirement is subject to nine exemptions. These include: national security matters, internal personnel rules and practices, any records specifically exempted by other statute, trade secrets and confidential commercial or financial information, inter-agency or intra-agency memos which would not be available to a private party in litigation with the agency, personal or medical files whose disclosure would unduly invade privacy, investigatory files compiled for law enforcement purposes, condition reports by agencies responsible for supervision of financial institutions, and geological and geophysical information and data concerning wells.

In any complaint action under the Act, the agency carries the burden of proof to sustain its decision to withhold information; officers responsible for improper withholding and noncompliance can be punished for contempt. In addition, there are three substantial changes which affect the availability of information: (1) a person need not be "properly or directly concerned" to secure information; (2) an effort is made to reduce vagueness through the delineation of standards, and (3) the jurisdiction of district courts is expanded to permit them to better scrutinize the agency's discretion. Upon its passage then-President Johnson praised the Act, saying: "I sign this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."[48]

The above notwithstanding, there is considerable dissatisfaction with the operation of the Act. One commentator has written: "Though its aims were admirable, the 1966 Act has as yet failed to achieve what it was designed to do."[49] Another has cited Sam Archibald, the former counsel to the subcommittee that drafted the law: "Some agencies are using the law as a new excuse to hide more facts of Government. Other agencies are twisting the law to fit the secrecy system they have been following for decades."[50]

Prior to its amendment, the Administrative Procedure Act did not provide a judicial remedy for wrongfully withholding information and it imposed major restrictions on free disclosure. For example, under the old provisions an administrator could withhold information from a person who was not "properly and directly concerned" if such information required "secrecy in the public interest" or if it could be "held confidential for good cause found." This high level of agency discretion seems not to have been undermined under the new FOI Act, although that was the thrust of the amendment.

One commentator traces this latitude in agency discretion not so much to the statute itself but to the "restrictive House [Committee on Governmental Operations] analysis" of the measure. The House interpretation of the measure was accepted by the attorney general in a memorandum prepared for the federal departments and agencies.[51] Additional criticisms of the Act center around its vagueness (even though the Act aimed at setting explicit standards), overly restrictive court interpretation of the "any person" clause and extensions of several governmental withholding privileges unknown to the Act.

The point is not so much the strengths or weaknesses of the Federal FOI Act as the unyielding difficulties in reorienting government to a disclosure-oriented posture rather than one that is withholding-oriented.

Nearly all the states have some statutory provisions touching on the area of right to know. According to fairly recent information, eight states have open meeting laws, six states have open records laws and thirty-two states have both open meeting and open records laws. These figures do not indicate the extent or effect of such statutes but only serve to indicate the pervasiveness of the state efforts in this area.[52]

Montana is one of the states that has both types of statues. Chapter 34 of Title 82 of the Revised Codes of Montana, 1947, contains provisions requiring open meetings of public agencies with certain exceptions:

82-3401. Legislative intent-liberal construction. The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this act that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the act shall be liberally construed.

82-3402. Meetings of public agencies to be open to public--exceptions. All meetings of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organization or agencies supported in whole or in part by public funds, or expending public funds, at which any action is taken by such public governmental body, board, bureau, commission or agency of the state or any political subdivision of the state, or organization or agencies supported in whole or in part by public funds, or expending public funds, at which any action is taken by such public governmental body, board, bureau, commission or agency of the state or any political subdivision of the state shall be open to the public, except as otherwise specifically provided by law and except any meeting involving or affecting;

(1) National or state security.

(2) The disciplining of any public officer or employee, or any hearing on, or of, a complaint against a public officer or employee, unless the public officer or employee requests an open meeting.

(3) The employment, appointment, promotion, dismissal, demotion or resignation of any public officer or employee, unless the public officer or employee requests an open meeting.

(4) The purchasing of public property, the investing of public funds or other matters involving competition or bargaining which, if made public may adversely affect the public security or financial interest of the state or any political subdivision or agency of the state.

(5) The revocation of a license of any person licensed under the laws of the state or any political

subdivision of the state, unless the person licensed requests an open meeting.

(6) Law enforcement, crime prevention, probation or parole.

82-3403. Minutes of meetings--public inspection. Appropriate minutes of all meetings declared to be open, shall be kept and shall be available for inspection by the public.

Of special note is the legislative intent that the provisions shall be liberally construed to provide maximum openness in the conduct of all public agencies; in addition, meetings of public agencies are required to be open. It also should be noted that the Montana Constitution contains provisions expressly dealing with the openness of legislative deliberations. Article V, Section 13 provides: "The sessions of each house and of the committees of the whole shall be open, unless the business is such as requires secrecy." This provision gives the legislature considerable discretion in deciding what business requires secrecy. This kind of provision is found in the constitutions of more than thirty states. It can be contrasted with the provisions of two states which require the legislature to sit with open doors without exception. Article IV, Section 12 of the New Mexico Constitution provides: "All sessions of each house shall be public." Article III, Section 12 of the Idaho Constitution provides: "The business of each house, and of the committee of the whole shall be conducted openly and not in secret session." Neither of these provisions expressly deals with the question of whether votes, committee meetings and committee votes ought to be public information.

Montana's statutory provisions on public records are found in Title 93, Chapter 1001 of Revised Codes of Montana, 1947. Sections 2 and 3 of this chapter reflect an 1895 effort to distinguish between "public" and "private" writings. "Public" writings are defined as

> the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country [and any] . . . public records, kept in this state, of private writings.

All other writings are private. Chapter 4 provides that "every citizen has the right to inspect and take a copy of any public writings of this state, except as otherwise provided by law [emphasis added]." In another 1895 provision, Section 5,

public officers are required to give copies of public writings to any citizen upon payment of the legal fees. Such copies can be admitted as evidence in the same instances in which the original could be admitted.

Even with the above-cited state provisions, many thorny "right to know" questions--relating to agency discretion and judicial construction of exemptions--remain unanswered. There is little opportunity at the constitutional level for the resolution of these detailed problems of agency discretion and executive and judicial construction of explicit disclosure exemptions. They are properly statutory matters which do not lend themselves to constitutional treatment. This is indicated by the low level of constitutional activity in the area of the right to know.

However, there <u>are</u> possibilities for broad statements of the public's right to know at the constitutional level. The proposed New York Constitution gives one example of the possible wording of a public record provision. Article I, Section II provided, in part:

> Records of the state, local government, public authorities and other public corporations, and all departments, agencies and instrumentalities thereof, including those created pursuant to an agreement or compact with another state or a foreign power, shall be public records open to inspection to the extent and in the manner provided by law.

In terms of wording, this provision does not set any governmental policy, nor does it direct the legislature to press for open records. The provision only provides that records are public insofar as the statutory law says they are public.

Other constitutional possibilities which suggest themselves include: a broad statement of the right of any person to view state and local government operations and records coupled with a mandate to the legislature to explicitly define exemptions in a manner consistent with such a right; a specific provision on the openness of legislative and executive proceedings, and a state policy commitment to public access and scrutiny of all governmental operations.

The Swedish Constitution contains a provision which is often cited as a model public access guarantee:

> To further the free interchange of opinion and general enlightenment, every Swedish citizen shall have free access to official documents . . . . This right shall be

> subject only to such restrictions as are required out of consideration for the security of the realm and its relations with foreign powers, or in connection with official activities for inspection, control or other supervision, or for the preservation and prosecution of crime, or to protect the legitimate economic interests of the State, communities, and individuals, or out of consideration for the maintenance of privacy, security of the person, decency and morality.[53]

Such a provision, it should be noted, is similar to the federal Freedom of Information Act except in one respect: it does not explicitly guarantee the citizen a judicial remedy for violation of the provision.

By way of conclusion, one contemporary political philosopher, Hannah Arendt, writing about broader questions than the right to know, has said:

> Opinions are formed in the process of open discussion and public debate, and where no opportunity for the forming of opinions exists, there may be moods--moods of the masses and moods of individuals, the latter no less fickle than the former--but no opinion [emphasis added].[54]

RIGHT TO BEAR ARMS

When Walter A. Burleigh of Miles City rose on the floor of Montana's 1889 Convention and drew the attention of the delegates to the danger of "carrying...deadly weapons in towns or cities, whether concealed or not" and asked for some discussion on the matter, he got none.[55] Today when guns are rarely strapped on before going to town, the "deadly weapon" is a hot issue and to ask Burleigh's question is to invite sustained and heated controversy. No doubt this will be the case at the convention, the recent senatorial election being one indicator.

In the English Bill of Rights of 1689, specific provision was made for the right of Protestants to bear arms. They had been denied this right under the Stuart policy of maintaining strictest control of the army and removing the influence of Puritans who had dominated it for some time. The phraseology of that day indicates the contemporary dilemma. Section 6 of the Grievances of the 1689 Bill holds that King James the Second violated the "laws and liberties of this kingdom . . . By causing good subjects being Protestants, to be disarmed, at the same time

when Papists were both armed and employed, contrary to law." The attempt to change this situation is expressed in Section 7 of the Rights of the People: "That the subjects which are Protestants, may have arms for their defense suitable to their conditions, and as allowed by law [emphasis added]."[56] It can be seen that even in this early wording of the right to bear arms, room was left for legislative action to regulate the right.

The recent controversy, sustained by the increasing number of crimes involving the use of deadly weapons and a heightened frequency of political assassinations, centers around the advisability and scope of such regulation. Concern is generally focused on the terms of constitutional provisions and the meaning of the phrase "the right to bear arms."

The Montana provision on the right is found in Article III, Section 13:

> The right of any person to keep and bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called into question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

The federal provision, contained in the Second Amendment to the U.S. Constitution reads: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

At present, the Second Amendment is not binding upon the states; it affects only the federal government. Nonetheless, U.S. Supreme Court cases provide interesting background and insights to the court response to right to bear arms provisions. In general, the Supreme Court decisions tend to conform with the historical background of the Second Amendment; that is, the chief concern of the right is seen to be the maintenance of a well-regulated militia rather than the protection of any broad individual right of possession.[57] In fact, the Court, ruling in U.S. v. Miller, expressly linked the right to bear arms to the "well-regulated militia" clause:

> In the absence of evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation of efficiency of a well-regulated militia, we can not say that the Second Amendment guarantees the right to keep and bear such an instrument.[58]

In a more recent decision, a federal court held that the U.S. Constitution's Second Amendment does not create a right, but is a limitation on the power of government to infringe a right.[59]

Such a decision indicates that one seeking protection of the right to bear arms should look elsewhere than the state constitution in an effort to secure the right. The common law apparently provides no basis for such protection, however; rather the common law treats it as a privilege subject to regulation or prohibition in the interest of public safety.[60]

Since the U.S. Supreme Court has not ruled conclusively that the Second Amendment protects the right of a private citizen to keep arms, it can safely be assumed that the federal protection restricts the power of Congress--and perhaps, the state legislature--to abolish the state's militia or disarm the citizen to the extent that he could not perform as a militiaman in the state's militia.

However, the Montana provision reads differently and does not predicate the right to bear arms on the needs of a "well regulated militia." The right clearly extends to the private person to the protection of his home, person or property. The provision also states the right of the person to aid the state when legally summoned.

In 1920, the Montana Supreme Court ruled that the Butte Miners Union claim for property damages against the city of Butte, alleging that an uncontrolled mob had destroyed its property, was valid. The court noted that the fact that the union had stored firearms in its meeting hall was not sufficient to overturn the damage claim since "under the provisions of the state Constitution, the right to protect property and to bear arms in defense of person and property is guaranteed."[61] Discussing possible situations which would override the damage claim, the court said that the mere possession of firearms within the union meeting hall was not sufficient; what was necessary was that "such firearms were present in the building for unlawful purposes." Accordingly, the court said, the right to bear arms in defense of home, person and property shall not be called into question."[62]

In a 1940 case, the State Supreme Court again guaranteed the right to bear arms in a situation in which a man had shot a number of elk for overgrazing his land. This case again centered on the right to bear arms and the right to defend one's property.[63]

In a more recent case, the state court ignored the above-mentioned distinction between the federal Second Amendment

and the Montana Constitution's provisions. In fact, making them look identical, the court printed only the last clause of the federal Second Amendment.[64] In this case, the court reversed a conviction of one allegedly pointing a gun from his premises; in doing so the court cited Revised Codes of Montana, 1947, Sec. 94-3527, which authorizes "the carrying of arms on one's own premises or at his home or place of business."[65]

That the Montana provision was not written to prohibit the regulation of firearms possession is indicated by the concluding clause of Section 13 of Article III which states that the right granted does not endorse the carrying of concealed weapons. That the provision has not operated to prohibit firearms regulation is indicated by the fact that Montana law contains several regulations dealing with the possession of firearms. A few examples are the prohibition against importing armed men into the state (Revised Codes of Montana, 1947, Sec. 94-3524 and Sec. 31 of Article III); general prohibitions against the carrying of a concealed weapons (Secs. 94-3525, 94-3527, 94-3529), and a prohibition of the carrying of any weapon by a prisoner (Sec. 94-3527.1). The most significant state statute on the control of firearms, however, is to be found in Section 11-957: "The city or town council has power . . . to prevent and suppress the sale of firearms, and carrying of concealed weapons."

The above notwithstanding, the debate over the scope of the regulation of firearms continues. An example of the proposals suggested for firearms regulation can be seen in the program announced by John H. Glenn, Jr., who said:

> Our proposals ask for three things only: (1) licensing of gun-owners to keep guns out of the hands of dangerous individuals; (2) registration of guns so they cannot be passed on without control; (3) a ban on mail-order and interstate sales to curb evasive and "anonymous" sales.[66]

Opposition to such proposals is not difficult to find. It includes some of the following points:

1. Gun control will not stop crime and violence because crimes are committed by people with guns, not by guns alone.

2. Stronger gun controls will not prevent criminals from obtaining weapons illegally.

3. The lawless and violent would only use other weapons if they were deprived of guns.

4. Proposed registration of guns would not have prevented nor will it curb the alarming extent of political assassination.

5. Instead of making it more difficult for ordinary citizens to obtain guns, the penalties for the commission of crimes involving firearms should be increased.

6. Registration would affect adversely those who keep guns for hunting, sportsmanship, self-defense or whatever.

7. The control of gun sales and ownership would lead to the eventual disarmament of American citizens.

Advocates of the gun regulation proposals cited above are not difficult to find, either. Some of their responses are given below, the numbers corresponding to the above arguments.

1. F.B.I. Director J. Edgar Hoover, has said: "Those who claim that the availability of firearms is not a factor in murders in this country are not facing reality . . . . There is no doubt in my mind that the easy accessibility of firearms is responsible for many killings, both impulse and premeditated."

2. The effort must be made to make it more difficult for the criminal to obtain weapons, even if it cannot preclude altogether his obtaining them.

3. Other weapons require the criminal to be in closer proximity with his victim at greater risk to himself.

4. Bans on mail order sales of guns, a licensing provision prohibiting the sale of guns to ex-convicts and increased opportunity to screen potential purchasers of firearms could have prevented three of the major political assassinations of this decade--John Kennedy, Martin Luther King and Robert F. Kennedy.

5. In addition to the fact that experience has established that stiffer penalties do not necessarily deter crime, the primary reason for regulation is not to keep ordinary citizens from obtaining firearms but to make it more difficult for criminals to obtain them.

6. Under registration, guns would still be no more difficult to obtain than used cars, prescription drugs and passports. They still could be used for lawful purposes.

7. Under a registration and licensing system, no responsible law-abiding citizen need turn in any gun. In addition,

the argument summed up by the phrase "The Czechs Registered Their Guns" cannot be taken seriously. Certainly, with five Warsaw Pact nations invading, as occurred in Czechoslovakia, the registration of guns is of relative insignificance.[67]

The debate continues with more arguments than could be dealt with in an essay the size of this entire report. Perhaps, as is noted by one recent commentator on state constitutional right to bear arms provisions, "while most of the familiar forms of arms regulation seem valid even under arms provisions guaranteeing a right to private possession, those provisions restrict to some extent the scope of permissible gun control."[68]

What must be kept in mind is that no state constitutional provision, no matter how strongly worded, would override a federal enactment regulating the sale or use of firearms.

NOTES

1. Alexis de Tocqueville, Democracy in America (New York: New American Library, 1956), p. 95.

2. Ibid., pp. 97-98.

3. Hawaii, Legislative Reference Bureau, Article I: Bill of Rights, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968), p. 63. Cited hereafter as Hawaii Reference Bureau, Bill of Rights.

4. Richard A. Chapman, "The Federalist and Apple Pie," Paper delivered before the 1970 annual meeting of the American Political Science Association, Los Angeles, September, 1970, p. 1.

5. Glenn Abernathy, The Right of Assembly and Association, (Columbia: University of South Carolina Press, 1961), p. 11. Cited hereafter as Abernathy, Assembly and Association.

6. Henry Steel Commager, Freedom, Loyalty and Dissent (New York: Harper and Row, 1954), pp. 112-114.

7. David Fellman, The Constitutional Right of Association (Chicago: University of Chicago Press, 1963), pp. 2-3. Cited hereafter as Fellman, Association.

8. Ibid., p. vii.

9. NAACP v. Alabama, 357 U.S. 449 (1958).

10. Ibid., p. 460.

11. Myron W. Solter, "Freedom of Association--A New and Fundamental Civil Right," George Washington Law Review, 27 (June 1959): 666.

12. NAACP v. Button, 371 U.S. 415 (1963).

13. Fellman, Association. p. 104.

14. Abernathy, Assembly and Association, p. 251.

15. Ibid.

16. Hawaii Reference Bureau, Bill of Rights, p. 64.

17. Alan Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970's," Columbia Law Review 66 (1966): 1231.

18. Howard B. White, "The Loyalty Oath," Social Research 28 (Summer, 1961): 77. Cited hereafter as White, "Oath."

19. Robert L. Housman, "The First Territorial Legislature in Montana," The Pacific Historical Review 4 (December, 1935): 380. Cited hereafter as Housman, "The Territiorial Legislature."

20. Ibid., p. 381.

21. It is interesting to note that Governor Edgerton himself was not required to subscribe the oath as he was a former chief justice of the Idaho Territorial Supreme Court and was exempted.

22. Housman, "The Territorial Legislature," p. 381.

23. Emilie Loring's "Montana Bill of Rights," an undergradute paper written at the University of Montana in 1962, notes this discrepancy at pp. 6-7.

24. Senate Bill 163, 1971 Legislature.

25. Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

26. Jethro K. Lieberman, Understanding our Constitution (New York: Walker and Co., 1967), p. 137. Cited hereafter as Lieberman, Constitution.

27. Baggett v. Bullitt, 377 U.S. 360 (1964).

28. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

29. Lieberman, Constitution, p. 138.

30. National Municipal League, Model State Constitution, 6th ed. rev. 1968 (New York, 1963, 1968), p. 3.

31. Howard B. White, "The Problem of Loyalty in American Political Thought," Social Research 21 (Autumn, 1954): 316. Cited hereafter as White, "Loyalty."

32. Ibid., pp. 316-317.

33. Ibid.

34. Ibid., p. 138.

35. White, "Oath," p. 105.

36. Hawaii Reference Bureau, Bill of Rights, pp. 57-9.

37. Ralph J. Bean, Jr., "The Supreme Court and the Political Question: Affirmation or Abdication?" West Virginia Law Review 71 (February, 1969): 99-100.

38. White, "Loyalty," p. 316.

39. Ibid., p. 328.

40. White, "Oath," p. 109.

41. One eighteenth century democratic theorist, Jean Jacques Rousseau, suggested the notion that the visibility of government to the citizen was not enough. He argued in his Social Contract that the citizen had to be the government at periodic intervals; that is, at certain times the government should fall open to complete citizen scrutiny and assessment and that this situation, in which the general will could be announced, was the true source of institutional legitimacy. This essay deals with the much narrower, and somewhat less democratic, concept of the citizen's right to know. Accordingly, it ignores the difficult questions of institutionalizing the citizen's power to assess the ultimate legitimacy of government, focusing on the availability of governmental information on its own operations. Thus, the essay does not deal with the questions of citizen participation; rather, it is concerned with citizen access and governmental visibility.

42. Missouri, University of Missouri, School of Journalism, Freedom of Information Center, "How to Use the Federal Public Records Act," (Columbia, n.d.).

43. Madison to Barry, August 4, 1822, in Saul Padover, ed., The Complete Madison, 1953, p. 337. Cited from Kenneth Salomon and Lawrence Wechsler, "The Freedom of Information Act: A Critical Review," George Washington Law Review 38 (1969): 150. Cited hereafter as Salomon, "FOI."

44. Cited from Ibid., p. 150.

45. Howard I. Kalodner, "The Right to Participate," The Rights of Americans, ed. Norman Dorsen (New York: Pantheon, 1971), p. 197.

46. John Hoerster, "The 1966 Freedom of Information Act--Early Judicial Interpretations," Washington Law Review 44 (1969): 641. Cited hereafter as Hoerster, "FOI."

47. Ibid., notes 7 and 8 at p. 642.

48. Statement by President Johnson Upon Signing the Federal Public Records Law, July 4, 1966.

49. Salomon, "FOI," p. 151.

50. Hoerster, "FOI," p. 645.

51. Salomon, "FOI," p. 163.

52. Missouri, University of Missouri, School of Journalism, Freedom of Information Center, FOI Digest 11 (1969): 6.

53. Hawaii Reference Bureau, Bill of Rights, p. 50.

54. Hannah Arendt, On Revolution (New York: Viking Press, Inc., 1963), p. 272.

55. Montana, Constitutional Convention of 1889, Proceedings and Debates of the Constitutional Convention (Helena: State Publishing Co., 1921), p. 253.

56. Richard L. Perry, Sources of Our Liberties (Rahway: Quinn and Boden Co., 1959), pp. 231, 245-246.

57. Peter Buch Feller and Karl L. Gotting, "The Second Amendment: A Second Look," Northwestern University Law Review 61 (March - April 1966): 62.

58. U. S. v. Miller, 307 U. S. 174, 178 (1939).

59. Cases v. U. S., 131 F.2d 916 (1942).

60. Hawaii Reference Bureau, Bill of Rights, p. 11.

61. Butte Miner's Union v. City of Butte. 58 Mont. 391, 194 P. 149 (1920).

62. Ibid., p. 402.

63. State v. Rathbone, 110 Mont. 225, 100 P.2d 86 (1940).

64. State v. Nickerson, 126 Mont. 157, 166, 247 P.2d 188 (1952).

65. On the need for applying this statute in the instant case, see Angstman, J., dissenting, Ibid., p. 168. Angstman's contention is that the defendant did not allege he was pointing a loaded firearm for the defense of his own property; that, says Angstman, was first contended by the majority court opinion. Accordingly, he would not reverse the lower court conviction.

66. John H. Glenn, Jr., Gun Control: Pro and Con (Los Angeles: New Chronicle Publishing Co., 1968), p. 12.

67. Cited, in general, from Ibid.

68. Michael D. Ridberg, "The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation," University of Chicago Law Review 38 (1970):210.

CHAPTER VI

PROCEDURAL RIGHTS AND ISSUES

INTRODUCTION

This discussion accepts for organizational purposes the standard distinction between "substantive" and "procedural" liberties, even though the individual essays indicate the distinction does not represent a solid line between the two. Many are inclined to consider the traditional substantive liberties of speech, press and religion as the most fundamental of the rights enumerated in the declaration of rights. "However, without . . . [the] procedural requirements, protection of substantive rights would be flimsy, indeed."[1] Procedural guarantees are a necessary part of the concept of written guarantees of liberty and are as deserving of serious consideration as their better-known counterparts. This is especially true in a system that attempts to be "accusatorial rather than inquisitorial . . . [where] society carries the burden of proving its charge against the accused. . . ."[2]

A "revolution" in the area of procedural guarantees has been noted,[3] but it is a revolution of a particular sort. It amounts to an extension of federal guarantees to more or less unwilling states. During the 1960s, "nearly all the guarantees of the Fourth, Fifth, and Sixth Amendments (to the United States Constitution) have been made binding upon the states."[4] Although these rights have been extended to the states in a piecemeal fashion under the judicial doctrine of "selective incorporation," the process is so nearly complete that the federal Bill of Rights is almost universally applicable to state abridgements of civil liberties. David Fox has noted that this

> increasing federalization of the United States Bill of Rights under the theory of selective incorporation has reduced the status of New York's Bill of Rights to the point where today, in many cases, it is no longer the primary source of protection against state action.[5]

Fox continues that this application, apart from reducing the status of the New York Bill of Rights, may have made several of the state constitution's provisions clearly unconstitutional. In this connection, a note of warning recently was sounded:

> [T]he future of our federal system of criminal adjudication is ultimately in the hand of the states. While expanding constitutional protections

> make virtually all criminal proceedings subject to federal review, the degree of federal protection has been and will continue to be affected by the failure of state courts to provide adequate machinery properly to adjudicate and review federal claims. At present, district courts must defer to state findings of fact made after full and fair hearing, thereby leaving with state courts the power to control the ultimate disposition of federal claims in most cases. But this allocation of fact-finding responsibility is not inviolate. The Supreme Court has made clear that federal courts have power to review both law and fact. It is up to the states whether this power will be exercised to the full.[6]

Thus, it appears that the extent of federal ascendancy in the area of civil liberties will depend on the degree to which states meet the federal minimum procedural standards and make an effort to regain their lost position as the guardians of civil liberty.

The procedural provisions of Montana's Constitution are arranged in no particular order and are found scattered in several sections throughout Article III.[7] In one form or another, they cover the traditional rights of due process of law (which also has a "substantive" aspect), trial by jury, speedy remedy, habeas corpus, bail, self-incrimination, double jeopardy, the rights of counsel and confrontation, and the right to compel the attendance of witnesses in one's own behalf. A quick glance at this list gives some idea of the necessity of the judiciary interpreting these provisions with a view to increased specificity of application. The major principles of the procedural rights are discussed below. The rationale of other guarantees also is offered and specific problem areas are considered.

HABEAS CORPUS

By the end of the sixteenth century in England, the medieval writs used to secure the release of prisoners on bail in certain cases had become ineffective. Lord Macaulay noted this and went to the heart of the habeas corpus issue when he said: "what was needed was not a new right, but a prompt and searching remedy."[8]

The writ of habeas corpus, then, is not so much a fundamental freedom as it is "a mechanism for the protection of the basic

right of personal liberty."[9] It has been called "the 'Great Writ', the remedy for restraints on liberty contrary to due process of law."[10] Habeas corpus is an ancient device, but its application was not always what it became. It was applied in the thirteenth century to secure the appearance of the defendant before the court and, additionally, to summon juries. Until the fifteenth and sixteenth centuries, there was no established process for exercising the remedy; in fact, the eventual ascendancy of the principle probably had more to do with jurisdictional disputes between common law and ecclesiastical courts than anything else.

Rollin C. Hurd defines habeas corpus as "that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained."[11] It is a procedural remedy by which one has access to established judicial machinery in order to test the legitimacy of his detention.

The Montana provision on habeas corpus reads much like those in other states. It is contained in Article III, Section 21: "The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion, or invasion, the public safety shall require it." This provision probably was copied from the federal Bill of Rights. The Montana delegates who adopted it probably were unaware of the close vote in the First Congress of the United States that kept the federal provision from providing a writ of habeas corpus that could never be suspended.

On this point, the 1970 Illinois Constitutional Convention Committee on the Bill of Rights also narrowly defeated a proposal to preclude the suspension of habeas corpus. The proposal was designed to affirm the principle that any person should have the greatest possible access to the existing judicial machinery in order to challenge his confinement. The majority of the committee, noting that the chief executives of various states circumvented similar provisions by declaring martial law, desired that the legislature retain its power to suspend the right in extraordinary circumstances. They stated that the resort to martial law or other executive action might entail undesirable legal effects beyond detention.[12] That committee's discussion is not the end of the matter, however; nine states currently have in their fundamental laws the provision that "the writ of habeas corpus shall never be suspended."

The President's Crime Commission noted the importance of readily accessible habeas corpus without specifically dealing with the question of suspending the writ:

> Frequently this procedure is the only way . . . [a person convicted] can obtain judicial consideration of substantial constitutional infirmities in the process by which he was convicted. The availability of such a remedy is embodied in the Constitution and is basic to our system of law.[13]

Apart from the question of the possible suspension of habeas corpus, issues arise concerning its operation and effect. Over the years there has been a rapid increase in the use of habeas corpus petitions. This, coupled with a popular prejudice favoring judicial finality and the friction that has developed between the states and the federal government over appropriate standards of application, has brought the writ under scrutiny.

The anxiety created by the seeming inconclusiveness of judicial proceedings involving habeas corpus is somewhat understandable; however, so is the increasing judicial concern with the right of one imprisoned to test the legitimacy of his detention. Part of the solution to the problem of the increasing use of habeas corpus is an increased regard for the constitutional rights of one subjected to an accusatorial proceeding. Another important remedy lies in the improvement of state post-detention procedures. There is little doubt that "the broad scope of federal habeas corpus as a remedy for state prisoners has aggravated the tension in federal-state relations." Too, the release of a surprisingly high number of state prisoners by the federal courts indicates that states have denied petitioners federally assured rights.[14]

Some states have little or no procedure at all for relief. According to the President's Crime Commission:

> [M]ost of the remainder rely on a faulty and antiquated system of ill-defined common law remedies that fall far short of the protection available in Federal courts and of that which is constitutionally required.[15]

An outline of a possible habeas corpus procedure was given by Justice Brennan. After noting a substantial drop in the number of federal applications from state prisoners in one state that had updated its procedure, he said:

> The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims . . . . It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings . . . . It should

> provide for decisions supported by opinions, or fact-findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts.[16]

Statutory embellishments of the Montana habeas corpus provision can be found in Chapters 26 and 27 of Title 95 of the Revised Codes. Review of these provisions will indicate to what extent the Montana practice conforms to the above suggestions.

Another problem noted by the President's Commission was the lack of effective counsel for persons with a habeas corpus claim. The Commission said that the provision of counsel for persons in a habeas corpus action would tend to curtail worthless petitions and also would improve the quality of petitions that are sometimes written by the inmates themselves. Also mentioned were programs in several states that provide legal advice through law professors and students in addition to practicing attorneys. The Commission's summary recommendation sheds light on the possible revision of Montana's habeas corpus provision:

> States that do not have procedures that provide adequate postconviction remedies should enact legislation or establish rules that do provide a single, simple remedy for all claims of deprivation of constitutional right. These procedures should provide for the assistance of counsel. Petitions should be decided on their merits rather than upon procedural technicalities.[17]

The habeas corpus provisions of the Puerto Rico Constitution are a specific alternative. Article II, Section 13 of that Constitution provides: "The writ of habeas corpus shall be granted without delay and free of costs . . . [emphasis added]. A potentially broader statement of the habeas corpus writ provisions is found in the North Carolina Constitution. Article I, Section 21, titled "Inquiry Into Restraints on Liberty," provides:

> Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended.

DUE PROCESS OF LAW

No person shall be deprived of life, liberty, or

> property without due process of law. [Montana Const. Art. III, Sec. 27]

The forerunner of the modern day "due process of law" clause--perhaps the broadest concept shaping judicially stipulated procedural rights--is found in the Magna Carta. Section 39 of that venerable document reads:

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

This phrase is traceable through twelfth century English lawbooks to the eleventh century Holy Roman Empire.[18] At least as early as the fourteenth century, this "law of the land" provision was equated with the phrase, "due process of law."[19] In the middle of that century, Parliament announced:

> That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinheritied, nor put to death, without being brought in answer by due process of the law.[20]

It was this principle that was applied successfully in the Parliamentary battle against the inquisitorial procedures of the Court of the Star Chamber. This constantly redefined principle of due process was one of the most important found in the Magna Carta. And in the American experience, "probably no other principle of individual liberty was more frequently embodied in the colonial charters and statutes."[21] The earliest use of this provision in the colonies was in statutes declaring that the Magna Carta was applicable to colonists; in 1641, the Massachusetts Body of Liberties paraphrased the Magna Carta and gave due process of law its first written constitutional status.

For such a brief phrase, the due process clause today is quite powerful and its retention in the fundamental law is seldom questioned. A danger should be noted, however. Many rights are implicit in the concept of due process; since these are subject to change as courts redefine due process, consideration should be given to the separate statement of guarantees that are believed to be a part of due process but that may require specific enumeration to insure their explicit application. There is ample historical evidence that the broad "due process of law defies definition to cover all conceivable denials of it, present and future."[22] In fact, the entire history of United States Supreme Court interpretation of due process from

its adoption is one of excluding particular rights of the federal Bill of Rights from the Fourteenth Amendment due process phrasing, thereby denying their applicability to state action which allegedly violated due process of law. Justice Black, dissenting in the 1947 Adamson case, listed those rights which the states were not required to follow; the list included nearly the entire Bill of Rights and indicated an erosion of due process of the most chronic magnitude.[23]

What the court actually accomplished during this period was an extension of due process to the corporation as a "person"--an extension for which there was no apparent justification in any of the debates on the Fourteenth Amendment--and an obliteration of the due process rights as they applied to individuals. The due process cases that overflowed the courts were, in the main, corporate cases.

> [F]or more than sixty years, it became the principal political business of the financial community to seek the election of presidents who would appoint judges who would make the kind of decisions that would suit the digestive process of these all-too-natural "persons". There were few indications during these halcyon years that the word also took in the human race.[24]

Finally, in 1940, the Olsen decision announced that although the corporation was still a "person," the substantive due process guarantees would not guarantee corporate profits or render a corporation immune to government regulation.[25] What had happened over the years was that the Supreme Court had denied its own 1856 dictum that the meaning of the Constitution was to be sought in

> those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[26]

In doing so, the court gradually whittled away constitutional rights that many believe should have had due process extension. The Founding Fathers, who set forth the explicit rights of the Bill of Rights because they felt them to be fundamental, might have been appalled to see those rights adjudged to be outside the criteria for incorporation into due process of law. The judicial statement of this point can be found in the Harlan dissent in the Hurtado case.[27] Recently, the courts have felt

compelled to retrace their steps and begin "the slow, intermittent, difficult and painful restoration of the constitutional rights thus taken away."[28]

Thus, a broad statement guaranteeing due process is not an unmixed blessing. Though the content of due process no doubt gives valuable elbowroom to the judiciary in the development of substantive and procedural rights, a jealous regard for more important aspects of that due process indicates that they should be stated separately. If specific rights are found significant, it would be wise to enumerate them specifically rather than casually assume that they fall under someone's notion of what due process of law contains. The current application of due process is as broad as this discussion has indicated. It has been extended in such directions as guaranteeing fair play, the general standards of society and, more especially, the concepts of liberty and justice believed fundamental to the development and maintenance of American civil and political institutions.

DOUBLE JEOPARDY

Perhaps the most ancient of the procedural guarantees is the protection against double jeopardy. In fact, this "protection against multiple trials . . . seems to have been so well-established in our legal heritage that its origin has been lost."[29] It is reasonably certain that the principle existed in classical antiquity with a limited exposition in the Digest of Justinian. By 355 B.C., Demosthenes had argued that "the laws forbid the same man to be tried twice on the same issue."[30] Although it may or may not have reappeared in England in the early fourteenth century, the principle did appear in the writings of Hale and Coke of the seventeenth century and Blackstone of the eighteenth. At that time there was a series of four pleas, two of which--previous conviction and previous acquittal--are especially relevant to the application of double jeopardy today.[31]

Thus, prior to its incorporation into the Fifth Amendment to the United States Constitution, double jeopardy was an entrenched principle in English jurisprudence. With such an impressive background, it might be assumed the principle has achieved a clear expression in modern times. Such is apparently not the case, however. One commentator has noted:

> The riddle of double jeopardy stands out today as one of the most commonly recognized yet most

> commonly misunderstood maxims in the law, the passage of time having served in the main to burden it with confusion upon confusion.[32]

Another states that it is "more commonly revered than understood" and that it is not always revered. He refers to the statement of an earlier writer that double jeopardy is a "quaint relic of medieval jargon."[33]

The significance of the principle of double jeopardy centers around a prohibition against retrying a person for an offense for which he previously has been convicted or acquitted. It was designed initially to prevent the government, with all its resources, from harassing an individual by subjecting him and society to the expense of repeated prosecution. Justice Black summed this up in 1957:

> The state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[34]

Based on that reasoning, the principle of double jeopardy was incorporated into the Fifth Amendment to the federal Constitution and nearly all the state constitutions. It is found in Article III, Section 18 of the Montana Constitution with typical wording: "nor shall any person be twice put in jeopardy for the same offense."[35]

An early leading federal case on double jeopardy concerned itself with the effect of a state appeal on the double jeopardy protection.[36] The court held that, although an appeal by the federal government after a defendant's acquittal violates due process, permitting the state to do so did not violate due process. This occurred after the federal Court had incorporated the First Amendment into the due process clause of the Fourteenth, thereby making it applicable to the states. The court did not, however, feel inclined to do this with the protection against double jeopardy as it did not hold this protection (and many other federal Bill of Rights provisions) to be "of the very essence of a scheme of ordered liberty." Thus a state appeal was held not to violate the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[37]

The court did not really deal with the central issue of double jeopardy--repeated harassment of an individual by government--but ruled only that jeopardy was continuous until a final verdict. Such a determination did not square the states with the federal practice, however, for at the federal level such an appeal would constitute double jeopardy.

Since this 1937 case, the court has recently extended the right to cover the states.[38] Benton v. Maryland, decided in 1969, specifically overrules the 1937 decision and holds that a retrial by the state of an accused who has been acquitted violates due process of law.[39] Later cases further outline the court's understanding of the double jeopardy clause. In Price v. Georgia, the court noted that it had

> consistently refused to rule that jeopardy for an offense continues after acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given full opportunity to return a verdict on the greater charge.[40]

In the same case, Chief Justice Burger cited an 1896 Supreme Court decision which held:

> The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject [for the same offense] to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy . . . .[41]

From these two statements, the general outline of the current understanding of double jeopardy emerges. Double jeopardy protects one against being "put in jeopardy" more than once; in addition, for the state to appeal the acquittal of a defendant is double jeopardy. This definition did not solve the problems of double jeopardy, however, and two recent decisions have added new depth to the rule. One, Ashe v. Swenson, holds that in a criminal case a state cannot relitigate on a question already decided in favor of the defendant at a previous trial.[42] The other case, Waller v. Florida, bars states and municipalities from successive prosecutions for offenses based on the same criminal conduct.[43]

These two cases, taken together, bring up the question of whether the court eventually may force the state to raise all its claims against a defendant at a single trial or forego the possibility of prosecution.[44] That, in turn, points up

the most critical issue in the area of double jeopardy: the so-called "two sovereignties" rule. This rule "purports to justify successive state and federal prosecutions for the same act on the ground that the two jurisdictions are separate sovereign entities, each having a separate interest which it is entitled to vindicate."[45]

Two leading U.S. Supreme Court decisions announced the two sovereignties rule. In the first, Bartkus v. Illinois, the defendant was first tried in federal court and was acquitted. Subsequently, he was convicted in state court on a similar charge coupled with a count under the Illinois Habitual Criminal Act. The Supreme Court, in a 5-4 decision, held that the defendant had not been denied due process of law.[46]

The second case, Abbate v. U.S., upheld a double conviction of defendants who allegedly conspired to dynamite certain telephone company facilities. The 6-3 decision held that federal law enforcement would be hindered if state prosecution barred federal prosecution.[47]

Both decisions have been strongly criticized by judges and legal scholars. The Black dissent in the Bartkus case is an example. He argues that double punishment was no less reprehensible because inflicted by two sovereigns. Emphasis on the danger to the presumed innocent, he said, would preclude the two-trial approach. Black went on to note that any federal law enforcement interest could be protected by Congressional action rather than by encroaching on double jeopardy protection.[48]

In addition to Black's dissent and considerable other legal criticism, there is a principle of international law which bars prosecution in a country after trial by another country which has concurrent jurisdiction.[49] The court itself, from time to time, has rejected the "distinct sovereignties" notion that formed the basis of the two sovereignties rule and has hailed an "age of 'cooperative federalism'" which would seem to indicate a more cooperative approach to the various state and federal interests.[50]

There is a good chance that the two sovereignties rule has only a short life left. The solution to the problem seems to lie in the realm of increased federal and state cooperation in deciding which entity should prosecute.[51] Certainly additional consideration must be given to the predicament of a defendant faced with the possibility of more than one prosecution.[52] A committee of the Association of the Bar of the City of New York has recommended that, until the two sovereignties rule is modified or abolished, states should provide by constitutional mandate the protection

of the rights of the defendant by yielding their jurisdiction and refraining from repeating federal prosecution.[53]

SELF-INCRIMINATION

> No person shall be compelled to testify against himself, in a criminal proceeding . . . . [Montana Const. Art. III, Sec. 18]

* * * * * * * * * * * * * *

In the middle of the seventeenth century, one John Lilburne, having run afoul of certain press strictures of the importation of books, was called to answer before the Star Chamber. He announced that as a matter of "fair play," the "due process of law" and "the good old laws of England," he did not have to answer any questions "against or concerning" himself.[54] Lilburne argued that self-incrimination violated both the Magna Carta of 1215 and the Petition of Right of 1628--two documents previously mentioned as being central to the development of written guarantees of civil liberty.

Both before and after Lilburne's statement before the Star Chamber, the right against self-incrimination has been continually interpreted, expanded, lauded and denounced. The right and its continuing judicial interpretation is still a matter of dispute with, for example, a number of constitutional historians denouncing recent Supreme Court decisions for having "flunked history," for using "law office history" and "for abusing historical evidence in a way that reflects adversely on their [the justices'] intellectual rectitude as well as their competence."[55]

The debate centering around the right runs the gamut from denigrating it as an historical relic that is "nothing in truth but a misquotation consecrated by age," to civil libertarian disappointment that the right is not as broad as it might be.[56] Somewhere in between are expressions praising recent U.S. Supreme Court decisions which have a solid, though unacknowledged, ally in history.[57]

Indeed, no civil liberty has been so widely criticized as this which prevents the one person who supposedly knows most concerning the alleged criminal act from being compelled to testify.[58] No less an authority than former Chief Justice Charles Evans Hughes recommended its abolition.[59] On the other hand, perhaps no more sign of the perennial necessity of the right need be noted than Senator Joseph McCarthy's temporarily popular derision of what he called "Fifth Amendment Communists."

The right against self-incrimination originated in protests demanding that noncomformists be shielded from the ecclesiastical courts' practice (used notably by the High Commission and the Star Chamber) of calling before them suspected heretics who were required to swear oaths and answer incriminating questions generally without being subjected to any formal charge or being treated to the procedural right of confronting their accusers. Thus, the right was asserted to prohibit compelling a person to tell the truth to his own detriment. Those who desire to see the right restricted often forget that it initially exluded true testimony (as distinguished from the exclusion of the false and unreliable testimony that frequently results from a coerced confession) and was designed to protect those who were, in all probability, guilty. More precisely, it protected those guilty of holding opinions critical of their government or church or of violating laws they considered to be unjust.[60]

Among the early victims of the practice of coerced self-incrimination were Puritans and other religious and political nonconformists. The fact that some of these immigrated to the New World and brought with them their opposition to self-incrimination goes far to explain the firm roots the principle has in the American experience. In the colonies, some of the most vehement in demanding the right were those who violated British colonial regulations; they sought in it protection from the prerogative courts of the royal governor and councils.[61]

At least seven of the thirteen original colonies had a provision protecting the right in their constitutions. It was included among the rights demanded by four states during the federal Constitution ratification process. Proposed by James Madison, the right was adopted into the Bill of Rights with no debate in the First U. S. Congress. It currently is protected, mainly by constitutional provision, in all fifty states. In addition, the U. S. Supreme Court has ruled that the federal Constitution's Fifth Amendment provision is incorporated into the Fourteenth Amendment and thereby sets minimum standards of protection for state compliance.[62] However, this does not necessarily limit the states' ability to effect meaningful constitutional changes in this area. The court has made it clear in several cases that states were free to develop their own safeguards, so long as they are "at least as effective [as those prescribed by the Court] in apprising accused persons [for example] of the right of silence and in assuming a continuous opportunity to exercise it."[63]

The Montana Provision

The self-incrimination provision in the Montana Constitution [Art. III, Sec. 18] is quite similar in wording to that of the federal Constitution: "No person shall be compelled to testify against himself, in a criminal proceeding . . . ." The federal Constitution [Fifth Amendment] provides "nor shall [any person] be compelled in any criminal case to be a witness against himself . . . ." A problem with these wordings is that neither provision squares with the contemporary practice. That is not to say that the right has been bent out of recognition by the courts. Rather, as the Montana provision reads, it may be suspected that it is the right of an accused to remain silent in the face of an incriminating question in a criminal proceeding. But before and even at the time of the adoption of similar language in the federal Constitution, the practice extended beyond the right of the accused defendant, was successfully evoked for questions other than those which were only incriminating and was applied in civil proceedings as well as criminal. In 1776, Delaware removed the right from its other "rights of the accused" and gave it separate status. The wording of the provision in Article I, Section 15 was quite broad: "That no man in the Courts of Common Law ought to be compelled to give evidence against himself." Maryland had a similar limitation.

To make this point more clear, it should be remembered that at the time the right against self-incrimination was framed, the accused was not permitted to testify at all on the theory that he had too great a stake in the outcome of the proceeding. This is telling evidence that the right was intended to apply to witnesses, for if the accused could not testify it would be unnecessary to give him a right against self-incrimination. The U.S. Supreme Court, in 1892, holding that the right also applied to witnesses, said: "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal proceeding against himself."[64]

According to Levy, this right against self-incrimination was extended to witnesses in England as early as 1649. It was also a stated principle in American manuals of legal practice throughout the eighteenth century, as well as in such well-known English treatises as Blackstone and Hawkins.[65] To the questions of whether one can be compelled to answer in a civil action a question which could lead to a criminal sanction, the answer is clear: the right covers such a question and the person asked may refuse to answer. There is an abundance of English and early American state decisions on this matter, and it is contained in the case familiar to every student of American government, Marbury

v. Madison.[66] There are also a number of forgotten or abandoned state cases and one federal case extending the right to cover answers which would not incriminate but would adversely affect the person's civil interests or property rights.[67] However, the general rule now is that one must testify even if he is exposing himself to the possibility of a civil suit.

In the same vein, there are many early state cases in which persons were not required to answer if their answer would expose them to public disgrace or infamy. The forerunners of this dimension of the right were Protestant reformers of the sixteenth century who argued that no man should have to accuse himself. Common lawyers, including Sir Edmund Coke, the English case law, Blackstone, and even the Star Chamber accepted the idea. Despite this and the fact that American manuals of practice also stated the principle, the U. S. Supreme Court, in Brown v. Walker, ruled against it in a decision in which the court is alleged to have been "oblivious to the history of the matter."[68] But the court reaffirmed the Brown decision in 1956 with Justice Frankfurter stressing the importance of history to the decision.[69] Regardless of the Supreme Court view on the matter, it appears the rights against self-incrimination and self-infamy had a common footing.[70]

In 1649, John Lilburne unsuccessfully claimed the right to remain silent before a Parliamentary committee. Debate on this dimension of the right--to remain silent before a legislative committee--continued in the colonies where some legislatures accepted and others rejected the principle. In 1964, the U.S. Supreme Court extended the right to cover legislative investigations.[71]

The above discussion raises again the question of the extent of the right. Certainly the state constitutions wording is narrower than the practice. But should the right be extended to cover all manner of governmental proceedings against an individual? The Montana experience with the right may illuminate this question.

In general, it appears true that the Montana courts have "accorded far-reaching recognition to the privilege against self-incrimination."[72] Although there was no discussion on the provision in either the 1884 or 1889 conventions, the right was well-recognized in the Anglo-American law and was found in the constitutions of states to which Montana turned for reference. Prior to the 1884 Convention, there existed statutory protections of the right against self-incrimination in Montana. Two statutes with very similar language were

adopted in 1871. One read: "No person can be compelled, in a criminal action, to be a witness against himself . . ." [Revised Codes of Montana, 1947, Sec. 94-4808]. The other was one of the earliest stating the defendant's right to testify on his own behalf:

> A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn and may testify in his own behalf, and the jury in judging of his credibility and the weight to be given to his testimony may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the court or jury on the same. [Revised Codes of Montana, 1947, Sec. 94-8803]

The clause in the latter statute referring to a defendant's decision not to testify lays groundwork for the notion that no comment may be made on his refusal and his refusal to testify should not prejudice his case. No cases have come up in Montana where a prosecuting attorney has violated this restriction on comment. Likewise, there is no precedent dealing with the case of a judge commenting on a defendant's decision not to testify. It seems clear that this state joins with nearly all others in forbidding any comment on a defendant's refusal to testify. On this point, the Puerto Rico Constitution [Art. II, Sec. 11] contains explicit guarantee that no comment can be made on the defendant's decision not to testify: "and the failure of the accused to testify may be neither taken into consideration nor commented upon against him."

The second of the two Montana statutes cited above contains a peculiar sounding clause: "and the jury in judging of his credibility may take into account the fact that he is the defendant, and the nature and enormity of the crime of which he is accused." On its face, this statement seems to destroy the presumption of innocence traditional to the accusational system; various defendants have claimed as much. However, the State Supreme Court has upheld the lower courts' prerogative of reading this portion of the statute to the jury.[73] In fact, such an instruction was upheld in a case where the witness had not even taken the stand.[74]

Consideration of further constitutional clarity on this point seems in order. A constitutional re-statement of the presumption of innocence is a possible alternative, although in any case

such presumption is guaranteed by the common law. The Puerto Rico Constitution contains an explicit guarantee of the presumption of innocence in Article II, Section 11: "In all criminal prosecution, the accused shall enjoy the right . . . to be presumed innocent."

On the question of testimony which might tend to degrade, Montana has an interesting statute that is an ambiguous extension of the right against self-infamy:

> A witness must answer questions legal and pertinent to the matter in issue, though his answers may establish a claim against himself, but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed, but a witness must answer as to the fact of his previous conviction foor elony. [Revised Codes of Montana, 1947, Sec. 93-3102-2]

Several convictions have been reversed on this question.[75] In fact, the convictions were reversed because a degrading question was asked, regardless of the answer denying the degrading behavior. This distinguishes this situation from the general procedure in questions of self-incrimination. Ordinarily, in the case of incriminating questions, the question is posed and the witness refuses to answer; such is not the case with degrading questions.

There appears to be some problem with the capacity of the defendant to waive his right against self-incrimination. Since it is a personal right, he may do so; but in taking the stand he becomes subject to cross-examination and impeachment as are all other witnesses. He also supposedly is protected in the same manner as other witnesses. For example, the cross-examination to which he is subjected can be neither irrelevant nor defaming.[76] However, an interesting problem arises when a defendant decides to take the stand. The Greeno case held that in doing so he waives the right against self-incrimination.[77] This does not seem to square with the notion that he still has on the stand all the protections afforded any other witness; for an ordinary witness can, subject only to a possible contempt citation, invoke the right to refuse to testify. The presumption of a defendant's innocence could be further strengthened if, upon taking the stand, he still could refuse to answer specific questions.

An example of the type of problems encountered when a defendant waives his right against self-incrimination can be seen in the loyalty-security hearings conducted by the U. S. Senate Internal Security Subcommittee in the middle 1950s. The notion that one who voluntarily testified as to materially criminating facts therefore waived his recourse to the Fifth Amendment led to a number of prosecutions under the Smith Act. The Smith Act was one of a rash of guilt-by-association laws passed during the 1950s; in fact, it was the first sedition act passed in the United States since the Alien and Sedition Acts of 1798. In the loyalty-security hearings conducted to investigate possible violations of these acts, Senator Joseph McCarthy often asked a witness if he had ever been engaged in Communist espionage; when the witness responded with an unqualified "no," McCarthy then would claim that the witness had, by that answer, waived the protections of the Fifth Amendment and had to answer all subsequent questions. Witnesses who were aware of this inquisitorial type of procedural tactic often invoked the Fifth Amendment at the outset. At this point, two things could occur: (1) they could be cited for contempt or (2) they joined Senator McCarthy's burgeoining list of "Fifth Amendment Communists." The popularity of these blatant denials of fair procedure wore off and Senator McCarthy was later censured for his conduct by the United States Senate.[78]

This example of abuse of the right against self-incrimination is taken from the administrative realm. However, it does help explain the problem confronting a witness when he has to choose at what point to evoke the Fifth Amendment. Guidelines in this area are not clear: too early, and there is the possibility of a contempt citation; too late, and the court may rule that the previous answers amounted to a waiver of the protection. In the last analysis, the right against self-incrimination is a broad one, initially invoked in defiance of inquisitorial administrative and judicial procedure. Consistent with its own origins, the right can provide safeguards that will aid the effort to maintain the accusatorial nature of all proceedings. The next essay deals further with the effort to curb inquisitorial procedure and with the question of when a proceeding begins.

POLICE INTERROGATIONS

A shift has occurred in the attitudes of the U.S. Supreme Court concerning the value of confessions in the investigation and prosecution of the accused. In 1884, the court, through Justice Harlan, said that a confession "if freely and voluntarily made, is evidence of the most satisfactory character."[79] In 1964, the court declared:

> [A] system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.[80]

Controversy surrounds this area of procedure to a greater degree than perhaps any other provisions. According to a leading constitutional historian, "history is ambiguous on the controversial issue of current interest, whether the right against self-incrimination extends to the police station."[81] As noted above, the initial efforts to secure a right against self-incrimination were a protest against interrogation conducted prior to formal accusation. That is, at the root of the right against self-incrimination is a protest against an inquistorial procedure that bears more than a slight resemblance to the current practice of police interrogation. In the practice of the High Commission and the Star Chamber, a person was required to answer questions without any procedural rights against self-incrimination. In response to this practice, the early maxim, nemo tenetur seipsum prodere (no one is bound to accuse himself), meant that a person could not be required to supply the evidence that could indict him.

In 1966, at a time when much concern was being expressed nationwide about police interrogation, the Supreme Court handed down rules to protect the rights of suspects under interrogation. The court required that prior to interrogation, any person "taken into custody or otherwise deprived of his freedom of action in any significant way" had to be given certain warnings.[82] Noting that the adversary system of justice commences at the time when an individual is taken into police custody, the court listed four warnings that had to be made. The suspect had to "be informed in clear and unequivocal terms that he has the right to remain silent . . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court." In addition, the accused "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . ." Lastly, "it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." In addition to requiring these warnings, the court made it clear that a heavy burden was placed on the prosecution if a question rose as to whether a waiver of the rights to counsel and silence had, in fact, been made. The mere fact that a defendant proceeded to answer questions would not lead to a presumption that he had knowingly and intelligently waived his rights.

This decision, which extended beyond immediate precedent the right of self-incrimination by declaring it applicable to the "gatehouse" of American criminal procedure, did so with some historical justification. The decision did not meet with universal approval. Law enforcement officials were alarmed; civil libertarians were dissatisfied. For example, the American Civil Liberties Union, in an amicus curiae brief, unsuccessfully urged the court to require presence of counsel as a precondition for any police interrogation.

The court seemed to be saying that the protections surrounding the accusatory nature of a trial would become empty without the warnings required. Quoting a Harlan dissent, the court said that the trial--where guilt is supposed to be proven--would be little more than an appeal from the interrogation procedures of the stationhouse, "where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."[83] In addition, the court was saying that to condition the right of counsel on one's requesting it would effectively deny it to those who need it most--the ignorant, the inexperienced and those of low income.

Addressing itself to the traditional presumption of innocence, the court said that it was essential that the adversaries in a proceeding be roughly equivalent; thus, the suspect should not be made the instrument of his own conviction.

One of the leading rationales of the decision on procedural safeguard warnings was a dissatisfaction with the traditional "voluntariness test." Under this test, the court had to check the facts of each case it received in order to determine whether a confession was admissible. The difficulty with this type of approach was the inability of the prosecution and the police to agree with the defendant as to what had actually occurred in the interrogation proceeding. Under Miranda, the courts now are able to judge more easily whether a confession is admissible; if certain rights are not properly tendered and knowingly and intelligently waived, no confession can become evidence. The Miranda decision does not, however, entirely eliminate the credibility problem.[84] This inability to agree on the factual aspects of the interrogation procedure was at the root of the above-mentioned ACLU effort to have the presence of counsel a requirement for any police interrrogation. The American Law Institute has recommended the use of sound recordings "to help eliminate factual disputes concerning what was said to the arrested person and what prompted any incriminating questions."[85] A pilot program is being conducted in New York City by the Vera Institute of Criminal Justice using three methods of corroboration: a lay observer, sound recording and videotape.

According to a New York commission:

> [A] state constitutional requirement of sound recording, or other methods of corroboration, of the interrogation process would resolve many of the factual disputes concerning what occurred in the stationhouse.[86]

Because the Fifth Amendment has been applied to the states, all state courts are bound by the Miranda decision. A state is free, however, to develop its own procedural safeguards. A recent Montana case[87] offers an example of a state effort to embellish the type of standards imposed by Miranda. Although the case does not center squarely on the police interrogation questions of Miranda, it does contend that constitutional protections against self-incrimination and the right of privacy are afforded not only against violations by law enforcement officers but also against violations of privacy and the right against self-incrimination by private citizens. That is, a private citizen can violate the constitutional rights of another in such a way that reversible error can result if his testimony is admitted as evidence. Specifically, admitting as evidence the testimony of the defendant's sister-in-law as to an overheard telephone conversation was held to be reversible error.[88]

In this case, a sheriff's testimoney citing a conversation with the defendant was also admitted in the lower court. The conversation was somewhat prejudicial and occurred prior to the defendant being given Miranda-type warnings. The Montana Supreme Court said "state's counsel should refrain from using statements made prior to constitutional warnings except under unusual situations." The court went on to cite the Miranda decision at length to establish that the prohibition against the use of such statements extended to statements which freed one from blame as well as those which accused one and laid blame. The relevant part of Miranda cited and emphasized by the Montana court noted:

> [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.[89]

Possible constitutional alternatives--to assure compliance with the Miranda decision--for dealing with the inherent problems of police interrrogation inclued: (a) a requirement that a suspect be given the Miranda warnings on the rights of silence

and counsel by a magistrate; (b) a prohibition of police interrogations unless counsel is present, and (c) explicitly guaranteeing the right of counsel at the time a person is taken into custody. An additional requirement could require written records or recordings of the warnings to, and the questioning of, persons in custody.[90]

In any case, whatever revisions are felt necessary to the current provision on self-incrimination, one would want to be certain that such protection was "as broad as the mischief against which it seeks to guard."[91]

PROCEDURAL RIGHTS BRIEFS

This section covers procedural fairness requirements beyond the central principles discussed above. One should keep in mind throughout this discussion that:

> American public law is deliberately weighted in favor of defendants accused of crime. It gives the accused almost every conceivable assurance that he will have a fair trial. Indeed, our law is generally described as a defendant's law, in contrast with other legal systems which emphasize the necessities of the prosecution and give priority to the interests of society in the apprehension and conviction of criminals. We, too, are concerned with the suppression of crime, but we are equally concerned with the necessities of justice.[92]

The principle reason for this orientation is that America no longer has a private system of justice. Every criminal action is a carefully regulated contest between the government, attempting through the prosecutor to establish guilt, and the accused, attempting to point out doubt and maintain his presumption of innocence. In this contest, government is clearly the more powerful of the adversaries. Accordingly, procedural safeguards are designed to redress this imbalance on the theory that roughly equal adversaries make for fairer adjudication. In addition, the point at which government proceeds against an individual by picking him up, placing him under surveillance, or alleging the commission of a crime constitutes a serious step. At that point the person who feels the pressure of state activity and stands in full view of a sometimes hostile public temper is in instant trouble. As has been universally noted--and this is especially true in agitated times like now--oftentimes accusation is viewed as a clear sign of guilt. Automatically, the accused stands apart from the mainstream of

society branded by an accusation, protected only by a presumption:

> He may be imprisoned pending trial, unless he can secure bail, if indeed he is eligible for bail. He may lose his job, or be suspended from it, pending trial. His reputation is under immediate cloud. His family relationships may be irretrievably altered. If he happens to be in a profession where good reputation is peculiarly indispensable, he may suffer grievously, though completely innocent.[93]

As David Fellman goes on to say, "a defendant, in short, is in a bad spot, merely by virtue of being one, and needs every possible opportunity to establish his innocence, as soon, as publicly, and as decisively as possible."[94] This commitment to procedural fairness is not based upon an attitude that is soft on violations of the law or unresponsive to the legitimate claims of the victims of crime.

> The purpose of the law is not to coddle wrongdoers. It does not purport to multiply loopholes through which evil men may escape the consequences of their offenses against society. The purpose of our public law is to make certain, as nearly as the complexities and perplexities of our world will permit, that the truth will be discovered, and that justice will be done. For with us justice is the great end of government . . . Due process of law is not, primarily, the right of the accused. It is basically the community's assurance that prosecutors, judges, and juries will behave properly, within rules distilled from long centuries of concrete experience . . . . [I]n large measure justice is fair procedure.[95]

The following discussion deals with several elements of fair procedure: protection from excessive bail and undue pre-trial detention, the right of indictment by a grand jury, the right to know the nature and cause of the accusation, the right to a speedy and public trial by an impartial jury in civil and criminal cases, the right of counsel, the right of confrontation and cross-examination and the availability of compulsory processes for obtaining witnesses. Each is given expression in scattered provisions throughout Montana's present Declaration of Rights.

Excessive Bail and Detention

The Montana Constitution contains two provisions relating to bail. Article III, Section 20 provides: "Excessive bail shall not be required . . . ." This provision is identical with the federal Eighth Amendment. The Montana Constitution also goes beyond the explicit wording of the federal document in Article III, Section 19: "All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

The rights reflected in those provisions have deep historical roots. The old English common law extended bail in all cases--partly because of the costs and difficulties of detention.[96] Exceptions gradually were introduced until, by the mid-eighteenth century, bail was not allowed wherever an offense was of very substantial nature. This was at the time when there were in excess of 160 capital crimes; thus, offenses which were bailable were few and minor. In 1689, the English Bill of Rights announced the principle that bail must be reasonable; in this enactment, Parliament charged the ousted king with infringing the liberties of citizens by denying reasonable bail.[97]

There are very good reasons for allowing a person accused of a crime to be free on reasonable bail. As stated by Chief Justice Vinson in a 1951 Supreme Court case, "this traditional right to freedom permits the unhampered preparation of a defense." Further, "unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[98] Society may be entitled to assure that the accused will be present at his trial; however, if an accused is presumed innocent until convicted, he stands on the same footing as other citizens in society and does not belong in jail. Another rationale, stated in an old Supreme Court case, is:

> The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.[99]

For these and other reasons, provisions on bail have found their way into nearly every constitutional list of procedural safeguards. The Montana constitutional provisions are supplemented by Title 95, Chapter 11 of the Revised Codes of Montana, 1947.

Included in these statues are provisions for the defendant's release on his own recognizance, for overrriding the presumption of entitlement to bail, for bail after conviction (largely discretionary), for determining the amount of bail and so on.

In addition to the sections cited above, the Montana Constitution contains another provision prohibiting detention in the taking of depositions. Article III, Section 17 provides:

> No person shall be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary in order to take his deposition. If he can give security for his appearance at the time of trial, he shall be discharged upon giving the same; if he cannot give security, his deposition shall be taken in the manner prescribed by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of time and place thereof. Any deposition authorized by this section may be received as evidence on the trial, if the witness shall be dead or absent from the state.

This interesting safeguard has few parallels in other state constitutions. As the section first reached the floor in the 1889 Convention, it provided that depositions were to be taken in the presence of the accused and his counsel without exception. Delegate Carpenter said the section "would amount to nothing" in that version because "the accused can defeat it by simply not appearing." Accordingly, he moved to add the provisions which dealt with the taking of a deposition when the accused and his counsel did not appear after reasonable notice. In addition, his amendment contained the provision that depositions were admissible as evidence. On this point there was some conflict.[100] Delegate J. K. Toole showed a concern with the potential of this provision as a denial of the right of confrontation. He said he considered the provision to be "the most dangerous departure that has ever been made from the established principle in courts of justice." Noting that such a provision might save some money, he added:

> [T]o take [a witness]. . . and incarcerate him in prison is without authority under the [U.S.] constitution . . . . [T]o say that under this provision of the constitution, which guarantees these men the right to meet these witnesses face to face, that you may go off to the county jail, or elsewhere, and in the presence of the two or three or four persons, and

> in the presence of the accused, take his deposition which shall be brought into court and there used against him instead of allowing him to meet the witnesses face to face, is saying something, sir, that was never intended by the constitution of the United States, and which ought not to be permitted under this Bill of Rights.[101]

Toole was especially concerned that the accused should be able to "look into the face of [the] witness and ascertain whether or not he is telling the truth."[102] After considerable further debate Delegate Carpenter's amendment was passed, 45-13.[103] Still this doubt lingers: does the provision for taking a deposition and submitting it as evidence mitigate against the defendant's right to confront and cross-examine his accusers face-to-face in a situation where the jurors can judge the credibility of the witness's testimony? Would, say, the use of videotape for all depositions to be used as evidence obviate this difficulty, or would the use of such a device run the risk of turning the courtroom into a movie theater?

The Montana Supreme Court has had occasion to adjudicate some issues raised on this provision. In 1909, the court held that in the absence of an objection to the use of a deposition, it would be presumed on appeal that the deposition was properly taken.[104] In addition, the court said that the right of the accused to be present at the taking of a deposition is of the class of rights which may be waived, that the burden of proving that he was not present or that he was given no opportunity to be present rests with the defendant and that the officer taking the deposition was not statutority required to keep a written record of the proceeding.[105]

More recently, the court considered the problem of whether the taking of a deposition violated the defendant's right of confrontation as provided in Article III, Section 16 of the Montana Constitution. The court held that a properly taken deposition did not violate the right of confrontation. In announcing that a prisoner seeking a writ of habeas corpus had the burden of overriding a presumption that he had been tried legally, the court said:

> We are of the opinion that regardless of the words of the objection, the matter of confrontation was before the court, and it properly allowed admission of the depositions, for by petitioner's very act of participating in the taking of the depositions, the thoroughness of the cross-examination by petitioner's

> attorney negates any argument by petitioner that he did not have the right of cross-examination of the witnesses.[106]

Statutory embellishments of this tool for the production of evidence in criminal proceedings are in Chapter 18 of Title 95 of the Revised Codes of Montana, 1947. The rules for civil procedure are in the Montana Rules of Civil Procedure, numbers 26-32.

Grand Jury

The federal Bill of Rights provisions on the grand jury are a relatively unknown part of the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

Based on the staying power of an eighty-eight year old U.S. Supreme Court ruling, this part of the Fifth Amendment is not binding upon the states; that is, it has not been incorporated into the "due process" clause of the Fourteenth Amendment to the U. S. Constitution. In the 1884 case, the Supreme Court ruled that whether grand juries are an essential part of the system of criminal justice is a matter of state constitutional law, not federal law. Involved was a defendant charged with murder in California without a grand jury indictment. Upon being convicted and sentenced to death, he appealed contending that the Fourteenth Amendment due process clause made a grand jury an essential part of criminal trials. The court ruled that it was not unfair for the state to dispense with such a preliminary proceeding.[107]

It should be remembered that during this time, the Supreme Court was not applying any of the federal Bill of Rights provisions to the state; this case was only one of a series of rulings in which the court refused to do so. In any event, whether the court ever will see fit to require that the states abide by the grand jury clause of the Fifth Amendment is in doubt. Accordingly, in this area, state constitutional provisions set minimum standards.

The grand jury as an institution is a curious mixture of libertarian and non-libertarian elements. On the one hand, it is considered a safeguard against moving too fast against someone suspected of a crime. Two juries--the grand jury prior to indictment and the trial jury prior to conviction--must be convinced of the suspect's guilt. On the other hand, rules of evidence are different for the grand jury than for the jury trial. Evidence of a kind that cannot be admitted in a normal courtroom proceeding is admitted by grand juries. In addition, a person indicted by a grand jury appears that much closer to guilt after indictment.[108]

Ordinarily, a federal grand jury is composed of twenty-three members, sitting either to investigate a particular person suspected of a crime, or to investigate law-breaking in a particular area over a long period of time. If the grand jury is satisfied that there is "probable cause" that one has committed a crime, it hands down an indictment. The person indicted is brought to trial on the charges contained in the indictment.

The 1889 Montana Constitutional Convention had difficulty adopting the following provision now contained in Article III, Section 8:

> All criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court. A grand jury shall consist of seven persons, of whom five must concur to find an indictment. A grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary, and shall so order.

The delegates to the 1889 Convention showed appreciation of the testy balances involved in the legitimate use of the grand jury. When Section 8 first reached the floor, it provided:

> That, until otherwise provided by law, no person shall for felony be proceeded against criminally, otherwise than by indictment or information (and by information in cases where the accused has been held to answer by the committing magistrate), except in cases arising in the land or naval forces, or in the militia when in actual service in times of war or public danger. In all other cases, offenses shall be prosecuted

> criminally by indictment or information. A grand jury may be drawn and summoned at any time when, in the discretion of the district judges, it may be necessary.

Delegate Clark, in moving to amend all mention of the grand jury out of the provision, announced that his object "in making this amendment is to abolish, absolutely and forever, the grand jury system in the State of Montana." His statement was followed by applause. Clark said that in all his years of service on grand juries, most of the indictments were quashed. He went on to call the use of the grand jury inquisitorial and criticized the lax rules of evidence under which it operated. Applause also followed when he said the grand jury was "a relic of the dark ages" and that it was time for Montanans "to rise up in their majesty and relegate it to the dark ages from whence it came."[109]

Delegate Dixon then rose and proposed the wording currently in the state Constitution, but the discussion of the matter was only beginning. Delegate Burleigh supported abolition of the grand jury, announcing:

> I believe the time has come when a man should go clothed in the full panoply of manhood and make his complaint against the accused, and have him arrested and held, and not any sixteen men in a secret inquisition.

Delegate Robinson then spoke against abolishing the grand jury entirely, urging that it had a valid limited use at the discretion of the district court judge. He said:

> If we could have ideal prosecuting attorneys at all times, then I would say wipe it from existence entirely; but experience has taught us that we won't at all times get men who are entirely independent and free from the influence of friends or power, or a fear, sometimes, of cliques . . . . Through the influences of these men prosecuting attorneys might not at all times do their duty . . . . It is a question for the consideration of this Convention, whether it would not be wiser to retain [it to the] limited extent . . . [proposed by delegate Dixon]. I am rather . . . inclined to support that proposition, and not to abolish the system entirely, but to retain it to that limited extent . . . .[110]

Delegate Clark then spoke mockingly of Delgate Robinson's contention that the grand jury could be used to investigate public officials. Clark said that he had seen some of those public records examinations:

> [T]he last day before the grand jury adjourns, they appoint a committee to go and visit the Treasurer's office; another committee will go down to the Clerk and Recorder's office, to see that he has not been derelict during the past year . . . . These gentlemen go down and see the Treasurer and Clerk, who sometimes have a box of cigars, the boys are treated, and they go off feeling satisfied . . . . [T]he idea of their making an examination such as ought to be made is little short of preposterous.[111]

During further debate, Delegate Marshall referred to the safe-guarding aspects of the grand jury as they were understood by the draftsmen of the U.S. Constitution:

> [I]t seems to me, not only for the protection of the citizen, but for the protection of the country, and the punishment of offenses, that the grand jury is a good thing. And I do not believe . . . that it is a relic of the barbarous ages. It was required by our forefathers to be put in the Constitution of the United States, because they believed it was a protection of the citizen.[112]

After considerable further debate, the grand jury provisions were passed in the present form. Final passage was secured with only a minor scuffle.[113]

As noted by an old line of Montana State Supreme Court cases, one of the principal reasons for adopting Section 8 was to do away with the machinery and expense of a grand jury by providing for prosecution by information.[114] In an 1895 case the court first announced this notion; in doing so, it also pointed to the

> two methods of procedure . . . indispensible where an information is filed, -- either there must have been an examination and commitment, or there must have been leave of court provided. But both steps are not required . . . . We think, too, that the rights of a defendant are guarded, no matter what procedure is followed.[115]

From these cases and the above debates, it can be seen that these grand jury provisions are designed to provide for its limited use in the state. Statutory embellishments of the grand jury can be found in Title 95, Chapter 14 of the Revised Codes of Montana, 1947.

Nature and Cause of Accusation

The Montana Constitution contains in Article III, Section 16 provisions guaranteeing the right of a criminal accused to know the nature and cause of his accusation: "In all criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation . . . ." This provision also is found in the Sixth Amendment to the U.S. Constitution. According to one commentator, "the indispensible, classic minimum requirement of due process is that one who is charged with having committed a crime be given adequate notice of his alleged offense and a fair hearing or trial."[116]

This concept is one of the lessons learned from the bad example of English practice, rather than the more typical practice of following English constitutional history. It is designed to allow the defendant to know in advance the precise nature of the accusation on which he will be tried. This is to insure that the trial remains an effort to inquire into closely defined questions of fact. If a defendant were not aware of the specific nature of his alleged offense, he would be ill-prepared to defend himself. Whether an accusation provides the necessary notice to the defendant hinges on whether it

> sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.[117]

The Montana Supreme Court has had several occasions to adjudicate on this provision. In a 1919 case, it can be seen how difficult it may be to decide how specific an information must be to constitute proper notification of the defendant. In State v. Wolf,[118] during a time when courts were especially impatient with World War I dissenters, the court held that a man faced with a sedition charge needed to be apprised of the specific language he used in the alleged seditious utterances. A general accusation that Wolf had used language "calculated to bring the soldiers of the United States and the uniform of the army of the United States into contempt, scorn, contumely and

disrepute" was not sufficient. In ordering him freed, the court said:

> The constitutional and statutory guarantees heretofore adverted to, requiring direct and certain allegations in criminal pleadings, are merely declaratory of the ancient common-law rule that no one shall be held to andswe an information or indictment, unless the crime be charged with precision and fullness, to the end that the defendant may have ample opportunity to make his defense and avail himself of his conviction or acquittal in a subsequent proceeding for the same offense. Further than that, it is essential that the particular offense be adequately identified and charged in such a manner as to enable the court to determine its sufficiency in law to constitute the offense prohibited by the statute . . . . The information is therefore defective in failing to set out the particular circumstances necessary to constitute a complete offense . . . . The defendant is ordered discharged from custody.[119]

Trial By Jury

The famed section 39 of the Magna Carta stated:

> [N]o free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

This demand is based on one of the oldest principles of English law: that a man who is to be judged should be judged by his equals. For example, a noble should not be judged by a vassal and vice versa.

This right has a Continental heritage dating back much earlier than King John's reluctant acceptance of the Magna Carta. Ancient forms of trial such as trial by battle, by ordeal or other forms of proof gave way to the importance of one particular form of trial, the trial by jury. This development is reflected in the Magna Carta; so inextricably have the two become intertwined that American constitutional law has come to equate trial by jury with the guarantees of the Magna Carta.[120]

During the seventeenth century when the first permanent settlements were made in the New World, trial by jury was very

popular in England. On the theory that local jury trials were a solid defense of popular liberties, the colonists rapidly accepted the institution. Accordingly, colonists would not acquiesce in the practice of removing colonial defendants to England for trial.

At the same time, in England there was heightened opposition to the arbitrary actions of judges who served at the pleasure of the crown. Efforts were made to strengthen the powers of juries, giving them authority to decide the law and the facts. This concern diminished in the early eighteenth century when the tenure of judges was changed to life or good behavior.[121]

The American dedication to trial by jury is reflected in the fact that the institution was written into many colonial statutes and all of the early state constitutions. Unlike those rights eventually appended to the federal Constitution as the Bill of Rights, trial by jury was incorporated into the body of the Constitution itself by the 1787 Convention. Article III, Section 2 of that document provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed.

That even this proposition was felt inadequate is indicated by the fact that the Sixth Amendment to the Constitution also guarantees the right:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

The federal Seventh Amendment provides for jury trials in civil cases:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law.

The most famous interpretation of the right to a jury trial was offered by the U.S. Supreme Court in 1929. The court ruled that a trial by jury has meaning "as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . ."[122] The court went on to say:

> Those elements were--(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.[123]

In 1968, the Supreme Court applied this requirement to the states by incorporating the right to a jury trial in criminal cases into the Fourteenth Amendment.[124] In doing so, the court said that the right was among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," that it was "basic to our system of jurisprudence" and that it was "a fundamental right, essential to a fair trial . . . ."[125]

The court stated:

> The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the states no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which--were they to be tried in a federal court--would come within the Sixth Amendment's guarantee.[126]

Since the court has not yet incorporated the Seventh Amendment right to a trial by jury in civil cases into the Fourteenth Amendment, the states remain the prime guarantors of this right.

The Montana Constitution in Article III, Section 16, contains the right to a "speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Article III, Section 23 speaks more directly to the trial by jury safeguard:

> The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice's court, both in civil cases and

> in cases of criminal misdeamonor, shall consist of not more than six persons. In all civil actions and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein.

The Montana Supreme Court has decided a number of cases under these provisions. Under the "impartial jury" provisions of Section 16, for example, the court in 1903 said:

> By the Constitution of this state, one accused of crime is guaranteed the right to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." An impartial jury must be composed of twelve impartial men. A number less than that will not suffice. If one of the jurors is incompetent because of actual bias entertained by him against the accused, and conceals such incompetency on his voir dire, this vitiates the jury as a whole. The accused being entitled to a jury of twelve impartial men, if he has but eleven, while the twelfth is hostile to him, he has not the impartial jury which the constitution and laws contemplate that he shall have.[127]

In general, the Montana Supreme Court has given considerable latitude to lower trial courts in challenges involving the alleged bias of jurors after completion of proceedings. This has even been true in cases where the juror admits that it will take evidence to overturn his opinion of the defendant's guilt.[128] The same general reluctance on the part of the court is apparently true in cases where the defendant requests a change of venue. In a 1970 case,[129] the court said:

> A clear abuse of discretion by the district judge in denying a change of venue is required to support reversal of his denial . . . . We find no abuse of discretion in Judge Duncan's denial of defendant's initial motion for a change of venue.[130]

In both situations--especially the defendant's challenge to jurors for bias--the issues clearly affect the defendant's presumption of innocence. In cases where a juror announces that it will take evidence to convince him that the defendant is innocent and the court accepts this as impartiality, the presumption of the defendant's innocence has been overcome.[131] Perhaps the same is true where the defendant's application for

change of venue must show "clear abuse" to obtain reversal. As previously noted, the Montana Constitution contains no statement of the presumption of innocence, although all courts supposedly are bound to observe it.

The court also has made a number of decisions under Article III, Section 23. For example, in 1904, the court announced that the right of trial by jury in civil cases was mandatory and did not hinge on the request by one party to an action for such a trial. In addition, the court specified the only manner for waiving a jury trial was that specifically prescribed by law.[132] Since that time the laws relating to waiver of jury trial in civil cases have changed and one who does not demand a jury trial in civil cases is presumed to have waived the right [Montana Rules of Civil Procedure, Rule 38(d)].

Speedy and Public Remedy

The Montana Constitution [Art. III, Sec. 16] contains a statement of the right of an accused to a speedy and public remedy: "In all criminal prosecutions, the accused shall have the right to . . . a speedy, public trial . . . ." This commonplace wording of the defendant's right to a speedy remedy also is found in the Sixth Amendment to the U.S. Constitution. Although the expression of the right, recently applied to the states, if fairly common, its boundaries are yet unclear.[133]

In general, there are two distinct types of efforts to implement this right. One is exemplified by Rule 48(b) of the Federal Rules of Criminal Procedure:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the circuit court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

This seemingly systematic effort to be obscure is in contradiction to the other type of implementation which compels prosecution within a certain specified length of time. An example of this type of provision can be found in the early territorial statute (now repealed) on speedy remedy. The Bannack Statutes contained a provision guaranteeing a speedy remedy as follows:

> If any person indicted for any offence . . . shall not be brought to trial before the end of the third

> term of the court in which the cause is pending . . . he shall be entitled to be discharged . . . .[134]

The newly adopted Montana criminal procedure revisions effected an open provision in cases of motions for continuance which reads: "This section shall be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the state to speedy trial" [Revised Codes of Montana, 1947, Sec. 95-1708(d)]. It is not clear whence this state right to a speedy trial was derived. This provision replaced a specific guarantee of the defendant's right to remedy within six months of the filing of an information. The state courts had occasion to interpret this section [94-9501] of the Codes before it was repealed. For example, in State ex rel. Thomas v. District Court, the court ruled that in determining the number of days the trial had been delayed, only days of delay not caused by the defendant would be counted. Specifically, the court held that even though more than six months had elapsed since the filing of the information, less than six months of that delay was not caused by the defendant; therefore, there was no violation of the speedy trial provisions.[135]

Interestingly, a proposed specific limitation on the time period after which a defendant must be released is contained in a draft declaration of rights done as a class project by a group of Helena High School students. The section, dealing with "legal rights" such as due process and fair treatment before legislative and executive investigations, reads in part: "and that right and justice shall be administered without sale and denial within one year of the occurence." This is perhaps indicative of an unascertained level of public alarm at the length of accusatorial and investigatory proceedings.

The second half of the "speedy and public remedy" proposition is the right to a public trial. This right also is part of the federal Bill of Rights Sixth Amendment; it has been applied to the states through the due process clause of the Fourteenth Amendment.[136] One commentator, writing on the presence of the press at highly publicized trials, has said "there is no constitutional compulsion to make special efforts on behalf of the news media. A right to a public trial is . . . the defendant's." Whether or not this commentator is guilty of mistaken emphasis in an effort to grind an axe with the press, the point is that the right is accorded the defendant in order to provide exposure to the adequacy of proceedings against him.[137] An example of the operation of this principle can be seen in the 1916 Montana case, State v. Keeler. In this case--a prosecution for rape--the court ordered that on account of the nature of the case no one should be allowed into the courtroom in addition to those

then present, and those present, after once leaving, could not return. Court officers, doctors, attorneys and newspapermen were excluded from the order. The defense had protested the issuance of the order but was overruled. However, the Supreme Court held that such an order was a denial of the defendant's right to a public trial saying:

> The Constitution declares that in all criminal prosecutions the accused shall have the right to a public trial (Section 16, Article III). Just what is meant by a public trial has been the subject of some discussion; but, with a single exception, we undertake to say that no court of last resort in this country has ever sustained an order of the character of the one before us, when timely objection to it was interposed.[138]

In dissent on this point, Justice Sanner, stating that this right was not an absolute, argued that the courts were

> under no obligation whatsoever to become centers of moral infection in order that the trial may be said to be public, any more than they rest under the obligation to make extraordinary efforts to take up the trial in order that it may be said to be speedy . . . . This provision . . . had its origin in an age when stenographers were unknown; when newspapers were few and under restrictions. The abuses of secret or "star chamber" proceedings conducted for political ends caused its formulation, and its object is to prevent a recurrence of such abuses.[139]

In general, suggestions for reform in this area are of a statutory nature. However, one possible constitutional alternative would be to stipulate against "unnecessary" delay (as does the current statute) and, in addition, set a time limit beyond which a defendant could not be prosecuted.

Right of Counsel

In 1696 in England, the Trial of Treasons Act was passed. This act developed the limitation that in order to convict a person of treason, there had to be two witnesses to the same overt act. More important, it announced the the defendant had the right to be represented by counsel. Although it was not until 1836 that English law guaranteed the right of counsel in all

cases, the Trail of Treasons Act was a step in that direction. Prior to that time, the rights of persons accused were restricted by a number of rules designed to aid the prosecution of alleged traitors and other lawbreakers. The accused could be held in solitary confinement with no chance to prepare his defense, contact witnesses in his favor or confront his accusers. In addition, rules of evidence were not well-settled. Curiously enough, as noted by Emilie Loring:

> [C]ounsel was permitted to appear in civil cases and in misdemeanor cases which, apparently, were too trivial for the state to be overly concerned with convictions. In cases involving major crimes it was assumed that the state could not bring the charge unless the defendant were guilty. An attorney, therefore, was an unnecessary complication . . . .[140]

This is no longer the case, counsel being considered an essential aspect of due process of law.

The gradual growth of the right of counsel on the national level is indicative of the value of having a set of guarantees at the state level similar to those at the federal level (assuming the state were vigorous in enforcing the guarantee). The federal Sixth Amendment protection of the right of counsel was secured in federal prosecutions by congressional action and judicial decisions. However, as a result of such decisions as Barron v. Baltimore,[141] which argued that the federal Bill of Rights guarantees were not binding on the states, the states could establish their own provisions for the right of counsel.

This situation held until 1932 when the first of the famous Scottsboro cases was decided. Nine blacks had been arrested and charged with the rape of two white girls in Alabama. The crime carried the death penalty. When arraigned, all pleaded not guilty. In setting up the subsequent trial, the judge did not ask the defendants whether they desired to employ counsel or if they wished to contact someone to obtain counsel for them; he simply appointed members of the local bar to handle the case. When the first trial began, only a week later, no counsel appeared and there was no evidence that anyone had prepared the defense. The local bar finally accepted the assignment and reluctantly prepared defenses. All nine blacks subsequently were convicted and sentenced to death. The state supreme court upheld the convictions. However, the U.S. Supreme Court reversed the first case to reach it. In doing so, the court held that the peculiar manner in which the defendant was effectively denied counsel offended the due process clause of the Fourteenth

Amendment. The court also ruled that the right to be heard in court was of little value if it did not include the right to be heard by counsel. The court noted the youth of the defendants, the obvious public hostility toward their case, their detention incommunicado while awaiting trial and the fact that their alleged crime was a capital offense as attendant circumstances which furthered the need for representation by competent counsel.[142]

Until 1963, this ruling was held applicable only to the special circumstances of the case. In 1942, for example, the court again faced the issue and held that the due process clause of the Fourteenth Amendment did not automatically apply the specific guarantee of the Sixth Amendment to the states. Basically, the court was arguing that the denial of the right of counsel did not necessarily indicate an unfair trial unless there were attendant circumstances. This put the court in the position of a case-by-case determination of violations of the right.[143]

Finally, in 1963, the court abandoned this special circumstances rule. In Gideon v. Wainwright,[144] the court made it clear that the right of counsel was essential enough to make it a part of due process and therefore binding on the states. The same day the court held that the right of counsel also extends to the first appeal in a criminal case; to say that the indigent has only one chance to vindicate himself was, according to the court, to draw "an unconstitutional line . . . between rich and poor."[145] Since that time the court also held that the Gideon interpretation of the right of counsel applies retroactively.[146]

The Montana Supreme Court also has had occasion to rule on the extent of the right of counsel. For example, in 1957 in State v. Blakeslee, the court said:

> The defendent may be as guilty as every felon not hanged. He is nevertheless entitled to a trial consistent with our Constitution and Codes . . . . Specifically, he is guaranteed counsel by appointment of the court, if he cannot himself employ an attorney. If then the court recognizes this right as were the case here, it is equally the duty of the Court to make the appointment of counsel effective, i.e., to give court-appointed counsel a reasonable time for the preparation of his case after he has been appointed.[147]

Another case, decided in 1929, dealt with the right of person incarcerated to consult privately with counsel about matters not related to the case pending against him. The court, in deciding the person did not have such a right under Article III, Section

16 of the Montana Constitution, announced that such a right was guaranteed by Section 8990 of the Revised Codes of Montana, 1923.[148] This section (currently 93-2717 of the Revised Codes of 1947) provides:

> All public officials, sheriffs, coroner, jailers, constables, or other officers or persons, having in custody any person committed, imprisoned, or restrained of his liberty, or any alleged cause whatever, must admit any practicing attorney and counselor at law in this state, whom such person restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody . . . .

This section goes on to specify a fine of $100 to be paid to the aggrieved for any violation of this right. In applying the statute to permit one incarcerated to see an attorney, the court also specified:

> [T]he right to consult depends upon legitimate business to be transacted, not upon a mere desire to visit the prisoner, and the reasonableness of the arrangement made in each case depends largely upon the nature and extent of the business to be transacted.[149]

Recent court activity on the subject of the right of counsel deals with questions of the effectiveness of counsel--especially court-appointed counsel. A 1963 Montana case indicates some criteria which may be used to argue a denial of due process for lack of effective counsel. In State v. Noller, the court said:

> The handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a "farce or a sham."[150]

Of a possible distinction between the degree of scrutiny of court-appointed counsel and counsel retained at the defendant's choice, the court said:

> Evidently this distinction, if any there is, between cases involving representation by retained or court appointed counsel, has been ignored in applying the aforementioned rule. We point this out, not to infer that we will make any distinction, but because we do not wish to appear that we rely on a rule that has been stated solely in cases involving retained counsel.[151]

The court went on in a tone markedly different from that of the previously cited Blakeslee decision, saying:

> We cannot say that defendant did not have adequate representation in the court below. A reading of the testimony convinces one beyond any reasonable doubt of what might be termed as "open and shut" case. Just what any defense counsel, faced with such evidence, could do is highly speculative.[152]

Beyond the fact that the state court is perhaps in no position to judge how little counsel might do for even the most guilty defendant, a possible question derived from this type of reasoning is whether the court should more carefully scrutinize a claim of inadequate representation when it comes from a defendant with court-appointed counsel. Such is a matter of increasing concern, the issue being the entitlement of one who cannot afford counsel to as effective counsel as one who can afford to select his own. Perhaps if an indigent could dismiss court-appointed counsel until he was appointed counsel who could adequately present his case, the presumption of innocence would be strengthened. In any case, it is easy to see that one who has counsel appointed to represent him at typically low fees might not be effectively represented, even if such representation did not reduce the trial to a "farce or a sham." It should be noted that under the provisions of Article III, Section 16 of the Montana Constitution, one also is guaranteed the right to represent himself if he chooses.

The Right of Confrontation

"The rights of an accused to confront and cross-examine adverse witnesses are a basic aspect of the American judicial process."[153] The safeguard of the right is found in the Sixth Amendment to the U.S. Constitution: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article III, Section 16 of the Montana Constitution also declares the right: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." According to David Fellman, this type of provision "is no more than a restatement of a very old common law rule dating from around 1600."[154]

The principal design of this provision is to permit the defendant to cross-examine his accusers and to question their credibility.[155] One of the most difficult aspects of the entire accusatorial procedure is determining the value of testimony that is given by various witnesses. In a system which places emphasis on the innocence of the accused, the testimony of his accusers is of

considerable importance. Under this right of confrontation the accused has the opportunity to publicly test the utterances of his accusers in order to aid the jury in determining the quality of their testimony. In addition, the physical appearance of the witness "enables the judge and jury to obtain the elusive and incommunicable evidence of a witness's conduct while testifying."[156] Various behavior patterns can indicate to the jury what a literal statement cannot. The Montana Supreme Court, ruling on Article III, Section 16 in State v. Storm in 1953, held:

> It was error for the trial court to allow the testimony of a witness at the first trial to be read into evidence at the second trial. It was the right of the defendant to have the jury see and observe the witness upon the witness stand. It was his right that the jury see how the witness acted under direct and cross-examination. It was his right to have the jury judge the credibility of the witness from his appearance and manner while on the witness stand. None of these rights could be had except and unless the witness met the defendant "face to face" in the presence of the jury during the course of the trial.[157]

The right of confrontation has been incorporated into the Fourteenth Amendment of the U.S. Constitution and is, therefore, applicable as a bar to state infringement. In Pointer v. Texas, the U.S. Supreme Court held that the right would be "enforced against the state under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[158]

An earlier Supreme Court decision gave shape to the right of confrontation.[159] In 1899, the court declared unconstitutional a Congressional enactment that a conviction of a person for the theft of government property was conclusive evidence that the property was stolen or purloined, against anyone who had received the property. In deciding this case, the court noted that the defendant was not confronted with witnesses against him; all he was confronted with was only "the record of another criminal prosecution with which he had no connection . . . ."[160] The court went on to say:

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of

> the accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt.[161]

The right of confrontation is part of such a presumption. As noted above, there is a potential conflict between this right and the detention provisions of Article III, Section 17.

The rights of confrontation and cross-examination are among those suggested for extension to administrative hearings and legislative investigations (see essay on safegauarding rights in administrative procedure, below).

Compulsory Processes for Obtaining Witnesses

The Montana Constitution also contains a provision giving a defendant the right to compel witnesses in his behalf to attend any criminal proceedings against him. This is guaranteed in Article III, Section 16: "In all criminal prosecutions, the accused shall have the right . . . to have process to compel the attendance of witnesses in his behalf . . . ." There is little debate over this provision which assures that the defendant can secure testimony in a manner similar to that of the prosecution. Special statutory implementation of this right was reaffirmed in the criminal procedure revision of 1965[162] and now is found in Section 95-1801 of the Revised Codes of Montana, 1947, under the general heading, "Subpoenas." It provides that upon the request of the prosecuting attorney, the defendant or his attorney, the court shall issue subpoenas. Subparagraph (1) of Section 95-1801 (d), in permitting the court to subpoena for "good cause" books, statements, papers, etc., for the inspection by the parties and their attorneys prior to the trial, authorizes what the Criminal Procedure Commission admits is a "fishing expedition" when applied to third parties only. Subparagraph (2) grants the defense access to documents which the prosecution may have obtained from the defendant prior to the trial.

In general, the compulsory process provision of Article III, Section 16 is an effort to assure the assemblance of all evidence important to sustain the adversay nature of a criminal proceeding and is subject to no controversy.

CONCLUSION OF FUNDAMENTAL PROCEDURAL RIGHTS

In conclusion, it can accurately be said:

> [N]o period of our history since the adoption of the Bill of Rights can equal the last decade in the scope, rapidity, and intensity of the changes in the law of criminal procedure. The rights of defendants in both federal and state courts have been greatly enlarged.[163]

The rash of concern over these changes, especially those announced by the U.S. Supreme Court, should not obscure their significance. One commentator, a justice of the California Supreme Court, has noted a cry has been raised that the decisions--such as the Miranda one on confessions--suggest an attitude that is "soft" on criminals. In reply, he cites impressive statistics indicating that the conviction rate does not depend upon the extended use of such constitutional safeguards, and concludes:

> [D]espite the public clamor, the enforcement of constitutional protections in this instance does not preclude the enforcement of the criminal law itself. That fact, however, does not lessen the opposition of the courts in their task of strengthening the constitutional rights of the individual in this tightening modern society.[164]

In addition, many of the reforms have come about through legislative enactment. Two examples are the federal Criminal Justice Act of 1964, which helped the indigent defendant be more certain of an adequate defense, and the Bail Reform Act of 1966, which eased the restrictions on pretrial releases.[165] State law has also played a part in this revision, a notable example being the recent revision of the Montana criminal procedure statutes.

In any case, it is crucial, as one commentator has noted, to avoid the tendency to choose sides and to support or reject the Supreme Court decision as if the matter ended there. What is important is that "the attempt to articulate and enforce a system of justice" be carried on and that the state courts bear their share in this effort.[166] To be certain that the base for this system of justice is sound is the task confronting the Constitutional Convention.

INCARCERATION AND THE ADMINISTRATION OF CRIMINAL JUSTICE

> Laws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death. [Montana Const. Art. III, Sec. 24]

Introduction

According to Elbert F. Allen, writing on the sources of the Montana Constitution, there was no discernible precedent for this section of the state Declaration of Rights. He says that Article III, Section 24 was "simply an embodiment into the constitution of [a] principle of common law."[167] There was a provision of this sort in the New Hampshire Bill of Rights of 1784. It provided that penalties should be "proportioned to the nature of the offense . . . the true design of all punishment being to reform not to exterminate, mankind."[168]

The 1889 Proceedings shed little light on the source of the provision; it is highly unlikely that the delegates were aware of the New Hampshire declaration on this point. When the provision was read before the Convention, Delegate Durfee of Deer Lodge promptly moved that it be stricken saying, "I do not see that it means anything."[169] In response, Delegate Knowles said the provision meant "a good deal."

> It means that the punishment for crime shall be with the view of reforming the criminal, and with the view to prevent it in the future, his committing the same crime . . . [I]nstead of incarcerating him simply as a punishment, without any other object in view than to simply punish a man in a kind of spirit of revenge, he is put there for the purpose of reformation and prevention . . . . The idea is that the punishment shall be somewhat with a view to reform the man, making him a better man, and especially in relation to our penitentiaries and institutions where men are confined who are to be punished for crime, that they shall have a tendency to make men better.[170]

After Delegate Durfee responded that such a provision "would be simply superfluous and lumbering up the Constitution without any purpose,"[171] Delegate Bickford rose to defend the provision. He admitted that the bill of rights committee was not certain that the provision meant anything. He then proceeded to say what he thought meant:

> Inasmuch as this is simply a declaration of principles, we thought it well to put the exception in there as a declaration of the people of this Territory, showing the ground upon which we punish crime--not, as Judge Knowles has well said, in a vindictive spirit, but in a spirit of prevention, and for the purpose of preventing the recurrence of the same crime, and that, as a civilized nation, we had some respect and something in common with the rest of the world. We want them to understand the principles upon which we base our laws. This is one of the progressive ideas of our present civilization, and one of the ideas which perhaps will shine as brightly in the years to come as any other--that our laws are based upon principles of humanity and not upon the principles of revenge.[172]

Delegate Durfee's motion to strike the provision was defeated and, in later session, the provision was adopted, with the added stipulation that the provision would not affect the power of the legislature to pass laws providing for capital punishment.[173]

Two recent studies of the Montana Constitution voiced minor complaints about the rehabilitation provision. The Montana Legislative Council noted that "only one of the six constitutions used for comparative purposes has a similar provision. Although this section may have little, if any, force, the Council concludes that it is adequate."[174] In a similar vein the Constitution Revision Commission subcommittee stated that "this section may have little if any force. The subcommittee feels that the section is unnecessary, but does not recommend deletion."[175]

One might question the reasoning of these two assessments. For example, if the provision has little force, in what sense may it be said it is adequate? Why does it have little force? And, if it is unnecessary why not delete it? That aside, there is considerable indication that the principle expressed by the provision is not dead letter on the law and is still at issue. Especially in the area of civil liberties, a rash of material has been written concerning the substantive and procedural rights of persons subject to detention or even death subsequent to conviction for the commission of various crimes. A brief exploration follows of three of these issue-areas that have received most attention: the rights of prisoners, the restoration of rights to convicted felons who have completed their sentence and the capital punishment question.

The Rights of Prisoners

Various groups in society do not enjoy the full protection of all the provisions of the Constitution. Persons in the military, persons who are mentally ill, and, under certain circumstances, persons under the age of majority do not have the complete protection. The U. S. Supreme Court, in cases questioning the denial of certain rights, has held that all these persons are entitled to all the rights enjoyed by others to the fullest extent possible.[176]

The court also has ruled specifically that prisoners are entitled to rights on the same basis, subject only to such modification as is necessary because of their status.[177]

That the denial of rights of prisoners is still at issue is indicated by the recent action of a three-judge panel of the Philadelphia Court of Common Pleas, which declared that sentencing anyone to Holmesburg Prison would violate the U. S. Constitution's Eighth Amendment forbiding cruel and unusual punishments. This decision was upheld by the Pennsylvania Supreme Court, which said in dictum: "Many of the prisons today are filthy, unhealthy, oppressive and often shocking, and for various reasons, the safety and security of many inmates are sometimes in jeopardy."[178]

That such a decision is not an isolated instance is indicated by the fact that state and federal courts in Florida, West Virginia, California and Illinois have held various penal institutions under their jurisdiction to be cruel and unusual punishment. [179]

One commentator, arguing specifically about the question of prisoners' rights, has said:

> [T]he application of constitutional rights to persons in prison will mitigate the evil effects of imprisonment . . . . [T]reating prisoners as men with substantial and enforceable rights, and with some vestige of dignity, may help check the deterioration of the spirit which normally takes place in prison. [180]

What might a list of the rights of prisoners contain? One commentator has listed a number of substantive rights: freedom of speech, press, religion, the right to petition for redress of grievances, the right to read whatever he

wishes, the right to speak about and discuss political views ("Here, however, there are some limitations; I do not suppose that mass meetings in prisons are practicable"),[181] freedom from censorship of mail and freedom of dress and physical appearance. He also lists some procedural rights: due process of law, prior knowledge of specific rules and regulations, written charges for alleged violations, an impartial hearing, representation by counsel and a defined appellate procedure short of the habeas corpus petition.[182]

Another commentator, writing from what he calls the "prosecutor's" point of view, has stressed that there is likely to be

> a growing interest not merely in the essentially negative constitutional rights--against physical violence, against unnecessary invasions of privacy, against racial segregation, against denials of religious freedom, against arbitrary punishment--but in more positive programs--for rehabilitation and retraining, for psychological counselling, for education, for medical treatment of drug addiction, alcoholism and chronic debilitating diseases, for programs which will even look beyond the prison walls to the support of the families of prisoners and the creation of a place in the community to which a prisoner can return with some likelihood of remaining there successfully.[183]

This commentator also refers to one other potential right of a prisoner, "the right not to be a prisoner so long as there is a reasonable prognosis that the defendant can safely be allowed to be rehabilitated in the community."[184]

It appears that a wholly adequate explication of the rights of prisoners could best be accomplished at the statutory level. Indeed, substantial institutional reform of the kind not possible at the constitutional level may be the only way to insure that prisoners can be treated as humans and thereby respond in kind. That is not to say there is no prospect for some broad commitment at the constitutional level; certainly the area of prisoner rights is one where the states could act to assert their initiative in the area of civil liberties. A constitutional alternative which suggests itself is some statement of the Gault principle that those incarcerated--not merely prisoners--have all the rights of citizens except when necessarily precluded on account of the terms of their incarceration. Perhaps this could be coupled with a legislative mandate to statutorily embellish the broad guarantee.

It is almost ironic that an old statement of constitutional principle, written apparently without acknowledged precedent from the common law, still speaks to one of the central dilemmas in the administration of criminal justice. This provision, written into Montana's Constitution more than eighty years ago, still embodies the paramount question surrounding the rights of person incarcerated. Thus, the problem with the provision appears to be not so much that it is ineffective, but that the conflict of values to which it speaks has yet to be resolved.

Restoration of Rights After Completion of Sentence

Apart from what substantive and procedural rights prisoners possess throughout incarceration is the question of the restoration--upon parole or completion of sentence--of any rights which may have been necessarily revoked. The central concern is that the human potential of every individual who has run afoul of the law "may be fairly evaluated and that every one that can be restored is restored . . . into useful participation in community life."[185]

The Montana Constitution and statutes contain a number of provisions on this question. Article XII, Section 2 provides: "[N]o person convicted of a felony shall have the right to vote unless he has been pardoned or restored to citizenship by the governor."[186] Article VII, Section 9 grants to the governor the "power to grant pardons, absolute or conditional," provided that before doing so, he obtains the approval of the Board of Pardons.

The matter of what rights are restored to felons is not as simple as these two provisions suggest. In addition, these provisions are open to the argument that they unduly restrict the convicted felon from returning to full citizenship after he has been released from prison. An example of the difficulties attending the status of a convicted felon can be seen in Section 97-4720 of the Revised Codes of Montana, 1947:

> A sentence of imprisonment in the state prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts, authority, or power, during such imprisonment. The governor has power to restore to citizenship any person convicted of any offense committed against the laws of the state, upon cause being shown, either after the expiration of sentence, or after pardon. The governor may request

> an investigation by the board of pardons to determine if such restoration to citizenship be advisable.

Explicit on the face of this statute is the notion that all rights are restored; it speaks specifically of a loss of all civil rights during imprisonment. But the second sentence of the statute says something quite different; it implies a loss of citizenship upon felony conviction, and further, uses an either/or language which indicates that a convicted felon may no longer be a citizen. Such a loss of citizenship, if it occurs, has no authorization in the sections of the Codes defining which persons are and are not citizens (Sections 83-301, 83-302, 83-404). As stated by the director of the Montana Crime Control Commission:

> [I]f a felony conviction does, in fact, suspend the felon's status as a citizen in Montana, then he is neither an "elector" nor a "citizen not an elector" he is in limbo, or something like that [emphasis added][187]

Seeing this lack of clarity, the statement of one commentator becomes significant:

> It is clear that the effects of a criminal conviction remain long after formal punishment has been completed. To the extent that these continuing effects do not serve a legitimate public interest, they must be removed in the interest of the individual.[188]

According to one commentator, as long as prisoners do not have clearly defined rights which cannot be taken away, the prison system will continue to operate "for only two purposes:"

> One is to punish people, frequently all out of proportion to what is required in the situation; the other is to quarantine them, to get them off the streets so that they will not harm anyone. All the talk about reform and deterrence is nonsense.[189]

Cruel and Unusual Punishments

The Montana Constitution [Art. III, Sec. 20] contains a prohibition on inflicting "cruel and unusual punishments." The federal Constitution's Eighth Amendment contains a similar provision: "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishment inflicted." The prohibition against cruel and unusual punishments is

> based on the long-standing principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.[190]

The principle was announced in 1553 in a statute which pointed out that the security of the body politic depended less upon the fear of law with harsh penalties than upon the respect the subject felt for the government. The statute noted that laws without harsh penalties were more often obeyed and respected than their more rigorous counterparts.[191] Blackstone, in his Commentaries, stated that the right to be free from cruel or unusual punishments "had a retrospect to some unprecedented proceedings in the court of King's bench, in the reign of King James the Second."[192]

The core idea expressed in this type of provision is the concern that the law be humane and that punishments sanctioned by the law do not shock the conscience of society--that they be proportionate to the offense for which the defendant was convicted. It is interesting that during the nineteenth century, the cruel and unusual punishment type of provision was thought to be obsolete; a similar criticism was noted above concerning Montana's constitutional provision on rehabilitation and prevention.[193]

However, in 1910, the U.S. Supreme Court announced that the "cruel and unusual punishment" provision was alive, and that it was "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[194] Since then, it has not become much easier to determine what constitutes a cruel and unusual punishment. Examples of interesting decisions under the Eighth Amendment include a 1962 Supreme Court case declaring that a statute which made it illegal to be addicted to drugs was cruel and unusual punishment. The court ruled that addiction was an illness--moreover, one which may be contracted innocently or involuntarily--and that therefore one addicted needed treatment not criminal conviction.[195] The court also assumed that the Eighth Amendment was applicable to the states and that it could therefore be used to limit the states' power to punish certain crimes in certain ways. It does not appear that Montana courts have had occasion to adjudicate significantly in this area.[196]

Perhaps the issue of greatest contemporary concern under this provision is that of retention or abolition of capital punishment.

Capital Punishment

Capital punishment is as old as recorded law, its use having been provided for in the Code of Hammurabi. The primary objective of its use at that point, as with the Hebrew law, was explicitly retaliation. Capital punishment was also a tenet of Roman law, its use there generally corresponding to contemporary usage. Capital punishment was differently defined in the Roman law to include banishment which, given the Roman preoccupation with public citizenship as the fundamental precondition of a valuable human life, was a punishment seen as being as bad as death.

Through the late Middle Ages and into the Reformation, capital punishment came to be applied less frequently in cases of sacrilege and more often in cases involving murder or property. It was at this time, especially during the eighteenth century in England, that capital punishment reached its peak. There were about 200 capital offenses in what was supposedly the most civilized nation in the world; these included the theft of five or more shillings, fishing in a private stream, or robbery of a rabbit warren. In 1801, a 13-year-old boy was hanged for stealing a spoon, and in 1748, a 10-year-old was hanged for murder. All this was justified at the time in the name of deterrence. The argument loses some of its credibility when it is noted that a favorite ground for pickpocketing, itself a capital offense, was among the crowds gathered to view public executions. Gradually, through the persistence of such men as Jeremy Bentham, Sir Samuel Rommilly, and many others, the number of capital offense was sharply reduced. Prior to this, a number of bankers had petitioned Parliament to reduce the penalty for stealing, then on the rampage, to a punishment that was more credible and more enforceable.

The colonies inherited capital punishment, along with various other English juridical practices, but the immediate trend was to reserve it for only the most serious offenses. In 1846, Michigan became the first state to abolish it; today ten states have abolished it.[197] Eight other states abolished it and later reinstated it.[198] Three states--Iowa, Maine and Oregon-- abolished it, reinstated it, then abolished it again. Most of Europe has abolished the death penalty with France, Spain and the Soviet Union retaining it. The U. S. Navy is among the long list of those who have de facto abolished capital punishment. Nearly half of the states fall into

this category--Montana is one. There is also a clear world-wide trend toward the de jure abolition of capital punishment--that is, abolition by statute or constitutional provision. In general, the main question-areas in discussing the retention or abolition of capital punishment are deterrence, the protection of society, discriminatory application and the charge that capital punishment is cruel and unusual by modern standards.

Deterrence. The central argument against abolition of capital punishment is that it prevents crime; that is, it acts as a deterrent to would-be criminals. The question here is not whether capital punishment by itself acts as a deterrent, but whether its deterrent effect is greater than that of a lesser punishment, for example, life imprisonment. Although some argue that it is nearly impossible to prove or disprove a relative deterrent effect, those who favor the abolition of capital punishment can cite impressive statistics to back up their contention that capital punishment has no greater deterrent effect than life imprisonment. The New York Herald Tribune noted editorially that the states that have abolished capital punishment

> have not found that the lack of a supreme penalty has affected their crime rate; careful comparison of states, region by region, shows that capital punishment does not have the deterrent effect which is alleged as its principal social excuse.[199]

If the death penalty is a deterrent for murder, then there should be a difference between the homicide rates of similar states, depending on whether the state has abolished the death penalty. Table 1 shows states that are alike socially and economically and have about the same population distribution; it does not support claims of the unique deterrence of capital punishment.

In fact, virtually every piece of statistical data available indicates that the homicide rate is not affected by the presence or absence of capital punishment. The Florida Special Commission to Study the Abolition of the Death Penalty states: "What they all seem to show is that there seems to be very little, if any relationship between the presence or absence of the death penalty and the homicide rate."[200]

It is somewhat strange in the face of considerable statistical evidence that the argument persists that capital punishment deters crime better than life imprisonment. It is commonplace

TABLE 1

MURDER AND NON-NEGLIGENT MANSLAUGHTER

(Rate Per 100,000 Population)

STATE	1964	1965	1966	1967	1968
Rhode Island*	1.2	2.1	1.4	2.2	2.4
Connecticut	1.8	1.6	2.0	2.4	2.5
Wisconsin*	1.5	1.5	1.9	1.9	2.2
Indiana	3.0	3.5	4.0	3.7	4.7
Michigan*	3.3	4.4	4.7	6.2	7.3
Illinois	5.5	5.2	6.9	7.3	8.1
Oregon*	1.8	3.4	2.7	3.1	3.2
Washington	2.4	2.2	2.5	3.1	3.6

*States that have abolished the death penalty.

Source: Federal Bureau of Investigation, Uniform Crime Reports (Washington, 1969).

in law enforcement circles to do so, however, and much of the testimony offered indicates that law enforcement officials sincerely believe abolition of the death penalty would increase the danger of their already hazardous occupation. One certainly would sympathize with them on this point, but again the weight of statistical evidence indicates there are no facts to support this position. Two studies on the effects of capital punishment on the homicide rate of law enforcement officials concluded there is no connection.[201]

Protection of Society. A second argument in favor of retaining capital punishment amounts to variations on the theme that capital punishment is necessary in order to protect society. Comment already has been made on the deterrence aspect of capital punishment's alleged protection of society. But according to the abolitionist position, there is no indication that persons who have committed capital crimes are more likely to commit other crimes than are those convicted of lesser crimes.[202]

In addition it is argued that it is the duty of parole boards not to release a criminal unless it is considered unlikely that he will commit another crime; of course, it is difficult to tell whether parole boards can make accurate assessments in this regard.

Retentionists also claim that prison personnel and inmates are put in a position of danger when the life sentence is substituted for capital punishment. They say that criminals under a life sentence are more likely to kill in an attempt to escape, especially if they know their sentence cannot be increased. There is no hard evidence offered along with such a contention.[203] Alternatively, some persons have even contended that convicted murderers are among the best-behaved prisoners.[204] It also is noted against the retentionist argument that one with a life sentence will be deterred from killing to escape because he knows all possibility of parole would be lost.

Statistical information concerning the dangers of paroling persons who have received life sentences is scant. What statistics there are seem to indicate that most such prisoners become successful parolees. As noted by one commentator:

> [O]f 36 prisoners under life sentence who were paroled between 1943 and 1958 in New York, only two were returned to prison--one for a technical offense, and the other for a burglary. Most of these prisoners would have been executed if their sentences had not been commuted.[205]

Discrimination and Equal Protection. Another argument against capital punishment is that its operation is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the federal Constitution. On this point, there is little doubt. For example, even though women commit approximately one of every seven murders, of the nearly 3,300 persons executed for murder between 1930 and 1962, only thirty were women.[206]

Race also is a clear factor in the application of the death penalty.[207] For example, between 1932 and 1957, twice as many blacks as whites were executed in the South. To be sure, crime rates for blacks and whites are different, but not to the extent reflected by capital punishment statistics. Especially in cases of rape the discriminatory application is clear. From 1930 to 1962, 446 people were executed for rape. Forty-five of these were white, two were Indian and 399 were black. A total of 436 of these executions were in the South. Of these, forty-two were white, two were Indian and 392 were black.[208]

Discrimination also is evident in the ability of the convicted to obtain commutation. For example, between 1914 and 1958 in Pennsylvania, whites received commutations three times as often as blacks.[209] According to one commentator:

> [E]ven if the existence of discrimination can satisfactorily be proven, it would be a mistake to argue that capital punishment should be rejected because some discrimination exists. The proper approach is to remedy the defect, not abolish the system. Emphasis should be on insuring uniform application in the future. If there is any justification at all for the death penalty it may well overcome the objection of the unequal application which can be remedied by more conscientious application.[210]

Against this it can be argued that the nature of society precludes an equal application of capital punishment unless there is some sort of quota system imposed. In addition, a law which does not have equal application--and this especially would be true where one was about to lose his life--is unconstitutional.

The Death Penalty as Cruel and Unusual Punishment. Contrasting opinions as to whether the death penalty is a cruel or unusual punishment are not difficult to find. For example, the U.S. Supreme Court in 1890 held that "the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies there is

something inhuman and barbarous, something more than the mere extinguishment of life."[211]

The court has since ruled that the cruel and unusual punishment clause is dynamic, not static, in meaning. In a 1910 opinion the court said: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."[212] More recently, Justice Barton noted in a dissenting opinion that "abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether."[213] The American Civil Liberties Union is one of many groups which have followed this line of reasoning and concluded:

> [T]he fact that capital punishment has been acceptable in the past is no reason for its continuation. The rack and the screw; drawing and quartering; flogging--all have been used and subsequently rejected as maturing and sensitive notions of the essential commands of human decency demonstrated the barbarity of the practices.[214]

The ACLU has concluded that contemporary notions of the significance of human life make imposition of the death penalty a cruel and unusual punishment and that it is therefore prohibited under the U.S. Constitution.

Conclusion. Montana has not had an execution since the early forties and is thereby considered to be one of the states which have de facto abolished capital punishment. Thus, Montana seems to fit in the trend toward abolition of capital punishment and comes within remarks made editorially by the New York Herald Tribune:

> Over the centuries, society has moved away from the crueler forms of inflicting legal death; it has limited the number of capital crimes; banned public executions; tended to be less ready to carry existing laws to extremes. Evidently, capital punishment itself is becoming outdated . . . as the public conscience becomes more and more aware of the possibilities for fatal error, of the capriciousness, of the relative ineffectuality of the death penalty, its end is inevitable . . . .[215]

Several alternatives for constitutional revision on this

point suggest themselves. Article III, Section 24 of the present Constitution leaves the matter to the legislature. Another alternative would be to specify certain offenses punishable by death; that would preclude the legislature from determining at a later date than an offense should not be punished by death. Capital punishment also could be abolished constitutionally, perhaps coupled with some reaffirmation of the inalienable right to life now specified in Article III, Section 3. Such a statement would prohibit any offense from being punished by death until the legislature and the public desired to amend the constitution. Finally, the issue could be placed on the ballot separate from the body of the constitution, or in alternative wordings for a kind of public referendum.

SAFEGUARDING RIGHTS IN ADMINISTRATIVE PROCEDURE

More than one person has noted that the delegation of legislative authority to executive departments has successfully bureaucratized government at the federal and state levels.[216] As Charles Reich has pointed out:

> [I]n a democracy, laws and politics . . . must theoretically be made in public by the people's elected representatives. But in today's overcomplicated world, an overwhelmed Congress has been forced to delegate a large measure of legislative power to specialized executive and administrative agencies the officials of which are not elected or directly controlled by the people.[217]

Reich also has noted that when this delegation of powers first began during the New Deal, the U.S. Supreme Court tried to halt it. Gradually, however, the court ceased demanding strict standards for the delegation of legislative powers, and government grew apace.[218]

For more than 100 years prior to the passage of the federal Administrative Procedures Act, the U.S. Supreme Court periodically admonished that the power to act arbitrarily could not be among any delegated legislative powers. According to the court, there was no room for arbitrary action within the constitutional system.[219] Circuit courts made the same point in announcing that administrative action was reviewable as to its arbitrariness.

This attitude was reflected in the wording of the federal Administrative Procedure Act as amended in 1968. The part of this statute relevant to these considerations is Section 10 which reads, in part:

> [E]xcept to the extent that--(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law . . . the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law.[220]

Despite that, there seems to be no end in sight to the prevalent assertions that administrative agencies are capable of dealing their own mangled form of due process. An example held to be inadequate administrative procedure--one with implications for the discussion of a governor's dismissal powers below--is the recent dismissal of a Montana Highway Department employee without a hearing. In a November 19, 1971 opinion, a Montana federal district court ordered that the employee be reinstated. The employee had written a letter critical of the governor's environmental policies and subsequently was dismissed. The opinion said:

> From all of the evidence, I find that the letter written by the plaintiff about the governor triggered the investigation, the purpose of which was to find some cause for discharging him; that such cause was found and was used to justify the act of firing.[221]

The highway department premised the dismissal on an alleged falsification of facts on the employee's job application. But the judge ruled that the search for these facts was triggered by the defendant's exercise of the First Amendments freedom of speech, and that due process required a hearing before dismissal.

Other rights are subject to denial by administrative agencies. For example, as one commentator has warned:

> [T]the growing pervasiveness of the elaborate administrative agency system, accompanied by an exponential increase in technology, has challenged the Fourth Amendment guarantee against unreasonable search and seizure.[222]

During the last session the Montana legislature adopted an Administrative Procedures Act [see Revised Codes of Montana,

1947, Title 82, Ch. 42]. The act aims at prescribing uniform procedures for the state's administrative agencies. It provides protection for all parties in contested cases through the mechanism of public hearings; its binds agencies to the common law and statutory rules of evidence, grants the right of cross-examination and guarantees that notice shall be taken of all judically cognizable facts in all such hearings. The act also provides for judicial review of all contested cases at the end of all administrative remedies. During such review, the party proceeding against the state agency may, in the same judicial proceeding, challenge the validity of a statute central to the administrative decision. In such procedings the court may not substitute its judgment for that of the agency when its weighs the evidence on questions of fact. It may affirm the agency decision or remand the matter for further agency action, or it may reverse or modify the decision if the agency has proceeded in violation of constitutional or statutory provisions, in excess of its statutory authority, using unlawful procedure, in erroneous law or in an aribtrary of capricious manner which amounts to an abuse of discretion. The statute also guarantees the right of counsel in all proceedings where one appears under compulsion or voluntarily before a state agency.

As mentioned in the essay on separation of powers in this report, one of the purposes of the Montana Executive Reorganization act of 1971 was "to strengthen the executive capacity to administer effectively and efficiently at all levels" [see Revised Codes of Montana, 1947, Secs. 82A-101 to 2103]. Under Section 82A-106(3) of this act, the governor is granted the power to dismiss the heads of newly created agencies at his pleasure. This provision did not meet with uniform acceptance during the legislature. If it is felt that such a provision grants too much private discretion to the chief executive, an alternative would be to safeguard certain rights of all state employees--to safeguard against arbitrary action against a department head or agency employee by granting any state employee who feels he is being arbitrarily dismissed the right to a public hearing if he desires one and, perhaps, to judicial review. Perhaps such a provision, without diminishing the governor's power to dismiss persons he appoints, could assure that the exercise of the dismissal power be subjected to public scrutiny. Such a possibility suggests itself under the theory that such a dismissal is an executive proceeding touching the vital interests of the employee and, therefore, should not be conducted in an arbitrary or capricious manner.

To provide broad written protection for the right to fair treatment in the course of legislative and executive

investigations and proceedings, various wordings have been suggested and adopted in several state constitutions. The 1968 proposed Constitution of Maryland contained the following provisions as Section 1.04: "No person shall be denied the right to fair and just treatment in any investigation conducted by the State or by any unit of local government, or by any of their departments or agencies." The Alaska Constitution contains a similar specific provision in Article I, Section 7: "The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed." Under such provisions, the questions of what is fair and what is just are left to the judiciary. The Puerto Rico Constitution contains a general provision dealing with abuses of one's dignity in Article II, Section 8: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life."

Robert Rankin, writing for the National Municipal League, has suggested a provision listing certain substantive and procedural rights specifically applicable to the administrative branch of government:

> 1. No person shall be bound by an administrative decision unless on a presentation of public notice; nor shall he be subject to the same official for both prosecution and adjudication, nor be deprived of liberty or property unless by a prescribed mode of procedure.
>
> 2. In all administrative proceedings, the accused shall have the right to a speedy and public hearing by an impartial arbiter and to be informed of the nature and cause of the accusation, to be confronted with the evidence against him, and to have the benefit of technical assistance in preparing a defense.
>
> 3. In administrative hearings, where the amount in controversy shall exceed twenty dollars, or when a fundamental right is involved, the right to a record of the proceedings shall be preserved. Proper appellate procedure must also be provided by legislative action.[223]

Those general provisions do not deal with the specific problem mentioned with respect to the state's Executive Reorganization Act. In that regard, a justice of the California Supreme

Court has said:

> [T]o protect the individual against arbitrary action of government and against the unfair discharge of its employees, the courts have gradually imposed in this area the requirements of due process: that the employee be accorded the right to be notified of charges, to defend against charges and to cross-examine accusers. Corollary protections are afforded to the individual who applies for work with the government but is rejected on unsubstantiated grounds of moral or patriotic unfitness. Finally, the individual who works for government . . . should be secure in his right of individual political expression and participation [emphasis added].[224]

The Constitutional Convention provides an opportunity to consider broad provisions guaranteeing freedom from arbitrary action and specific provisions guaranteeing the employee's right to be free from capricious dismissal.

SAFEGUARDING RIGHTS AGAINST PRIVATE POWER

An interesting possible extension of due process safeguards and substantive rights beyond the administrative arena deserves mention. To develop the possibility, it is helpful to discuss the notion that there are several kinds of freedom. This point is concisely made by Glenn Tinder in his study of the central questions of political thinking.[225]

In answering one of these questions--namely, "are men who live under a constitutional government necessarily free?"--Tinder gives two possible replies that are especially relevant here. If, argues Tinder, one holds freedom to be merely "a state of not being subject to arbitrary and excessive requirements on the part of government [emphasis added]," the answer is yes, men are free.[226] By definition, a constitutional government is barred from imposing arbitrary and excessive burdens; therefore, this definition of freedom is satisfied by the presence of a constitution.

If, however, freedom is conceived to be meaningful only if it means freedom from "arbitrary and excessive requirements from any source whatever, from a government, an employer, a relative, or anyone else [emphasis added]," then one could live under a constitutional government and remain quite unfree.[227] Under this concept of freedom, the important consideration is that the "freedom depends not on constitutional government alone, but on a social order in which every

major power, whether governmental or otherwise, is held within pre-established limitations."[228] An example of such an effort to impose limitations on corporations, unions and other social centers of sometimes arbitrary power is fair employment practice legislation. Such a theory--that government ought to "hinder hinderances" to freedom--is not new; for example, governments for years have attempted to weed out obstructions to permit the unfettered operation of what they conceived to be the free enterprise system.[229]

The question here is: can the due process of law safeguards and other substantive and procedural safeguards (perhaps freedom of expression. assembly and petition, etc.) be extended to the nongovernmental sphere? The following is a brief indication that such is already occurring.

An example of civil liberties activity and its potential in non-governmental areas can be seen in the case of labor unions. In the 1920s, civil liberties organizations were concerned with protecting the rights of embattled labor unions. Unions were one of the most bruised groups in American society in those days of sweeping injunctions which denied the right of assembly and the right to strike, of restrictions on union organizers which curbed free speech and prosecutions of union leaders on low-grade evidence. Although there are still signs that there are persistent tensions in the rights of unions to exist and function effectively, the labor union today in general is an accepted part of the established labor-industrial system. For example, the right to form and join unions has long been recognized as a part of the First Amendment's freedom of assembly.[230] The main liberties issues surrounding unions today have taken on a slightly different cast; they essentially revolve around substantive and procedural rights of union members.[231]

At the federal level, the rights of unions and their members are defined in statutes, particularly in the National Labor Relations Act of 1935 and the "Bill of Rights" for union members in the Labor-Management Reporting and Disclosure Act of 1959. Thus, in this area, the question is perhaps not so much what the Constitution requires but whether these statutes are adequate. That is, what rights should unions and union members have against private groups, including unions themselves?

A closely allied issue is the problem that has arisen along with the increasing trend toward recognition of the rights of unions to bargain collectively.[232] In a sense, a whole

system of inquisitorial government is potentially implicit in the power of the unions--as it always has been with corporations and other centers of private power--unless some issues are resolved. For example, one commentator asks:

> [W]hat rights shall [the union member] have to equal treatment under the governing rules of the collective agreement? What freedom shall he have to dissent from union policies? What voice shall he have in choosing union officers? And what constitutional due process in union trial procedures?[233]

As this commentator goes on to say, "these questions . . . have an important added dimension" beyond the traditional civil liberties issues.

> [T]he civil liberties issues confronted here . . . must be of central concern in the future--the protection of personal freedom within institutions of private power [emphasis added].[234]

Very little of the scope of labor law can be covered here, butthis body of law is a good example of the problems encountered in sorting out the rights of persons against private centers of power. What follows in a brief overview of some of the civil liberties issues regarding unions; whatever can be said of the union-union members relationship applies equally to other questions of prospective methods of increasing personal and collective freedom within other private institutions. In fact labor legislation in this area stands as a precedent for future activity within other private institutions. As noted by one commentator:

> [C]haracterization of the rights created by . . . basic labor legislation immediately suggests that perhaps other legislation should also protect individual rights and democratic processes within other institutions of private power. Our society is increasingly dominated by large organizations such as corporations, trade associations, professional societies, universities, foundations and political parties which have varying forms and degrees of control over individuals who come within their institutional sphere [emphasis added].[235]

Noting there may be some problems setting up democratic values within some institutions, he continues:

> What is remarkable, if not disturbing, is that such extensive protection of the democratic process in industrial institutions has generated so little serious consideration as to how and in what degree individual rights

> should be protected within our institutions of private power.[236]

The problems confronted in labor law include determining how a union might conduct its affairs under majority rule, while still guaranteeing minority rights. A specific example of a problem in this area occurred in the early 1940s when a union negotiated a collective bargaining agreement placing black employees at the bottom of the seniority list. The U.S. Supreme Court threw out the agreement, saying:

> Congress did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority . . . . So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it . . . to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.[237]

Thus, the union's duty to fairly represent its members was a necessary condition of its power to collectively bargain; the union could not collectively bargain unless it fairly represented those for whom it was bargaining. Other court cases have prohibited arbitrary discriminations on bases other than race, finding such discriminations in dismissals, denials of vacations or lower rates of pay.[238]

This notion of fair representation also covers the union's duty of processing grievances. The National Labor Relations Board has prohibited a union from refusing to process the grievances of a black and the practice of charging non-members for arbitration of grievances.[239] In addition, a federal court has rejected the practice of a union acquiescing in discriminatory application of contract provisions on the basis of race. The U.S. Supreme Court refused to re-hear the case.[240]

Although there are insurmountable problems--including, ultimately, undesireability--in the courts' overseeing union negotiation of a contract, what is insisted upon is the equal and fair application of general rules designed to give the individual protection against arbitrariness and abuse.[241]

Another example of rights activities within labor unions has to do with the maintenance of a democratic union. One of the

statutory efforts to accomplish this end is the Landrum-Griffin Act of 1959. According to one commentator:

> [T]he Landrum-Griffin Act trespasses directly on freedom of association, for it penetrates deeply into the union's processes of self-governance, imposing on the union and its members democratic standards and procedures for decision-making.[242]

This general principle is applied specifically to such rights as the right of membership, the right to vote, the right to fair and open elections and freedom of speech. In sum, it seems that a general protection of rights within the industrial sphere is developing. Most of the activity is still confined to the labor union area. As long as this remains true, these broad safeguards will protect only a portion of industrial workers.[243]

One commentator, Michael Walzer, has written in a slightly different context that the number of contracts the citizen has with the state is less than the contacts he has with corporate bodies. This is a form of the commonplace assertion that the corporate sphere of the western advanced industrial countries has developed further than--and perhaps outstripped--the distinctly political institutions. These corporate bodies, according to Walzer, collect taxes on behalf of the state, maintain standards under state requirements, spend money appropriated by the state, and, perhaps most important, enforce rules and regulations with the acquiescence and support of the state.[244]

Another commentator supports Walzer's contention and argues that the private sector often violates substantive as well as procedural rights:

> Government has no monopoly on repression of freedom of expression. Throughout our history, repression in the private sector of our lives has been more extensive and often more destructive of liberty than the official conduct of our public servants. Our current history is no exception. Employers discharge employees because they fear that the employee's opinion will undermine the good will of the company and reduce sales. People with unpopular ideas are expelled from an organization or denied membership in an organization. Small groups engage in violence or other disruptive tactics for the announced purpose of preventing a speaker from expressing his point of view. Individuals and groups vilify the character of another, solely to suppress his

> opinion and his right to express it. These examples can be multiplied. The first amendment is more than a proscription of certain governmental action. It is a declaration of policy that is fundamental to the concept of American liberty. If we believe in that concept, then the policy must apply to each of us individually and impose a moral, if not legal, obligation to accept and abide by its declaration.[245]

Walzer goes on to argue that even though these commercial, industrial, professional and educational organizations--as well as religious and labor organizations--all operate in close proximity, functionally speaking and physically, with the state, they do not duplicate the democratic politics of the state. That is, although they possess a myriad of official and semi-official functions and are quite a powerful part of one's daily life, their officers and practices are very seldom legitimated in the same sense one assumes is the case with the democratic state.

> These officers preside over what are essentially authoritarian regimes with no internal electoral system, no opposition parties, no free press or open communications network, no established judicial procedures, no channels for rank-and-file participation in decision-making. When the state acts to protect their authority, it does so through the property system, that is, it recognizes the corporation as the private property of some determinate group of men and it protects their right to do, within legal limits, what they please with their property. When corporate officials defend themselves, they often invoke functional arguments. They claim that the parts they play in society can only be played by such men as they, with their legally confirmed power, their control of resources, their freedom from internal challenge, and their ability to call on the police.[246]

These claims, perhaps more appropriate to an authoritarian type of organization, are subject to challenge when made in the economic sector of a democratic society. This, then, is the final point for consideration: should the procedural and substantive safeguards deemed central to the democratic character of a society be extended into the economic sphere? Alternatively, should one who feels his fundamental substantive and/or procedural rights have been violated have a constitutionally explicite remedy in the courts? Should

a person be protected against encroachments by economic power as well as by governmental power? If so, a possible constitutional alternative would be a broad statement guaranteeing fundamental substantive and procedural rights against private abuses. Such a provision probably would need to be supplemented by detailed statutory law.

NOTES

1. Emilie Loring, "Some Procedural Rights of the Criminal Defendant in Montana" (unpublished Master's thesis, University of Montana, 1963), pp. 1-2. Cited hereafter as Loring, "Defendant's Rights." In the area of procedural rights, a special debt is acknowledged to the work of Mrs. Loring. Her thesis provided the basis for much of this chapter.

2. Watts v. Indiana 338 U.S. 49, 54 (1949). On this point, it is curious to note that a principle parallel to the procedural right against self-incrimination--the presumption of innocence, a unique principle in Anglo-American jurisprudence--never has received constitutional expression. See Osmond K. Fraenkel, Our Civil Liberties (New York Viking Press, 1944), p. 143. Cited hereafter as Fraenkel, Our Civil Liberties.

3. See, for example, Editors of the Criminal Law Reporter, The Criminal Law Revolution, 1960-1969 (Washington: Bureau of National Affairs, Inc., 1969), p. vii.

4. Ibid. The rights of these three amendments include the prohibitions against unreasonable searches and seizures, double jeopardy and self-incrimination; due process of law, eminent domain, speedy and public trial, impartial jury, right to know the nature of the accusation, the rights of counsel and confrontation and compulsory process for obtaining witnesses.

5. David L. Fox, "New York Bill of Rights: Revision in the Federal System, Essays on the New York Constitution (South Hackensack, N.J.: Fred B. Rothmann & Co., 1966), Ch. II, p. 3.

6. J. Skelly Wright and Abraham D. Sofaer, "Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility," Yale Law Journal 75 (May 1966): 984-985. Cited hereafter as Wright, "Habeas Corpus."

7. Perhaps to tidy up the Declaration, these and the other statements could be organized in a more systematic order. This is, of course, less important than the actual presence of the guarantees. The sections containing procedural guarantees are Sections 6, 8, 16-19, 21, 23 and 27.

8. Thomas Macaulay, The History of England, ed. Charles H. Firth (London, 1913-1915), I, 237. Cited from Richard L. Perry, Sources of Our Liberties (Rahway: Quinn & Boden Co., Inc., 1959), p. 189. Cited hereafter as Perry, Our Liberties.

9. Perry, Our Liberties, p. 189.

10. Daniel John Meador, Habeas Corpus and Magna Carta (Charlottesville: University Press of Virginia, 1966), p.4.

11. Rollin C. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus (Albany: W.C. Little and Co., 1858), p. 143.

12. Illinois, Constitutional Convention of 1970, Synopsis: Bill of Rights (Springfield, 1970).

13. U.S., President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington: U.S. Government Printing Office, 1967), p. 139. Cited hereafter as President's Commission, Crime and Freedom.

14. Wright, "Habeas Corpus," p. 895.

15. President's Commission, Crime and Freedom, p. 140.

16. Case v. Nebraska, 381 U.S. 336, 346 (1965).

17. President's Commission, Crime and Freedom, p. 140. The use of the word "postconviction" in this summary does not square with the notion that habeas corpus extends to all persons detained and is not limited to those who are convicted. On this point, see Fraenkel, Our Civil Liberties, pp. 235-249. See also Sidney Asch, Civil Rights and Responsibilities Under the Constitution (New York: Arco, 1968) pp. 95-97.

18. Rodney L. Mott, Due Process of Law (Indianapolis: Bobbs-Merrill Co., 1926), pp. 1-2.

19. This equation sheds some light on the discussion of selective vs. total incorporation of the federal Bill of Rights provisions into the due process clause of the Fourteenth Amendment. It lends support to the argument that the Fourteenth Amendment was worded so as to apply the "law of the land" (including the federal Bill) to the states through the due process clause.

20. Perry, Our Liberties, note 5 at pp. 126-7.

21. Ibid., p. 429.

22. Irving W. Brant, The Bill of Rights: Its Origin and Meaning (New York: New American Library, 1965), p. 224. Cited hereafter as Brant, The Bill of Rights.

23. See Adamson v. California, 332 U.S. 46 (1947), especially Black, J., dissenting opinion at p. 68.

24. Brant, The Bill of Rights, p. 352.

25. See Olsen v. Nebraska, 313 U.S. 236 (1941).

26. Murray's Lessees v. Hoboken, 18 How. 272,276-7 (1856).

27. Hurtado v. California, 110 U.S. 516 (1884).

28. Brant, The Bill of Rights, p. 359.

29. Loring, "Defendant's Rights," p. 158.

30. Martin Friedland, Double Jeopardy (Oxford: Clarendon Press, 1969), p. vii.

31. Notes, "Twice in Jeopardy," Yale Law Journal 75 (1965): 262. Cited hereafter as Notes, "Jeopardy."

32. Notes, "Criminal Law--Double Jeopardy," Minnesota Law Review 24 (1940): 522.

33. Notes, "Jeopardy." For the irreverence to the principle, see William H. Comley, "Former Jeopardy," Yale Law Journal 35 (1926): 674.

34. Green v. U.S., 355 U.S. 184, 187 (1957). Cited in Loring, "Defendant's Rights."

35. An effort was made in the 1889 Convention to define "double jeopardy" precisely, but the delegates, realizing such a definition could be held to be exclusive, eliminated the qualifying phraseology. See Emilie Loring, "Montana's Bill of Rights," unpublished paper from Department of Political Science, University of Montana, Missoula, p. 18.

36. Palko v. Connecticut, 302 U.S. 319 (1937).

37. Ibid., p. 328.

38. Benton v. Maryland, 395 U.S. 784 (1969).

39. 16A C.J.S. 107, Sec. 584, 1971 Supplement, pp. 633-34.

40. Price v. Georgia, 398 U.S. 323, 329 (1969).

41. U.S. v. Ball, 163 U.S. 662 (1896). Cited in Ibid., p. 326.

42. Ashe v. Swenson, 397 U.S. 436 (1970).

43. Waller v. Florida, 397 U.S. 387 (1970).

44. This point is raised in Walter V. Schaefer, "Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe," California Law Review 58 (March, 1970): 391. Cited hereafter as Schaefer, "Double Jeopardy."

45. Ibid. p. 398.

46. Bartkus v. Illinois, 359 U.S. 121 (1959).

47. Abbate v. U.S., 359 U.S. 187 (1959).

48. Bartkus v. Illinois, 359 U.S. at p. 150.

49. Schaefer, "Double Jeopardy," pp. 400-401.

50. Murphy v. Waterfront Commission, 378 U.S. 52, 55-56 (1964). See also Elkins v. United States, 364 U.S. 206 (1960) where the court overturned a theory that permitted evidence illegally seized by state officials to be used in a federal trial for the same offense. In this case, Justice Stewart (at p. 210) noted the "entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity." He also stated (at p. 215) that it mattered not to the defendant whether his rights were invaded by a federal or a state official.

51. Immediately after the enunciation of the two sovereignties rule, the attorney general instructed all U.S. attorneys not to bring prosecution on the heels of an antecedent state prosecution unless they obtained his permission.

52. See Hawaii, Legislative Reference Bureau, Article I: Bill of Rights, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968), p. 95. Cited hereafter as Hawaii, Bill of Rights.

53. Association of the Bar of the City of New York, Special Committee on the Constitutional Convention, Bill of Rights (New York: 1967), p. 9.

54. Trial of Lilburne, Howell (comp.), State Trials III, p. 1315 (1636). Cited from Leonard Levy, "The Right Against Self-Incrimination: History and Judicial History," Political Science Quarterly 84 (March, 1969): Note 45 at p. 12. Cited hereafter as Levy, "Self-Incrimination."

55. Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," Supreme Court Review: 1965 (1965): 119-158.

56. John H. Wigmore, "Nemo Tenetur Seipsum Prodere," Harvard Law Review 5 (1891): 88.

57. Levy, "Self-Incrimination," p. 29.

58. Fraenkel, Our Civil Liberties, p. 143.

59. Hawaii, Bill of Rights, p. 100.

60. Loring, "Defendant's Rights," pp. 65-66.

61. Ibid., p. 66.

62. Malloy v. Hogan, 378 U.S. 1 (1964).

63. Miranda v. Arizona, 384 U.S. 436, 490 (1964).

64. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

65. Levy, "Self-Incrimination," p. 20.

66. Marbury v. Madison, 1 Cranch (U.S.) 137 (1803).

67. Levy, "Self-Incrimination," note 81 at pp. 21-22.

68. Brown v. Walker, 161 U.S. 591 (1896). Cited from Ibid., p. 23.

69. Ullman v. U.S., 350 U.S. 422 (1956).

70. Levy, "Self-Incrimination," p.23.

71. Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

72. Loring, Defendant's Rights," p. 94.

73. State v. Kessler, 74 Mont. 166, 239 P. 1000 (1925); State v. Inich, 55 Mont. 1, 173 P. 230 (1918); State v. DeLeo,

36 Mont. 531, 93 P. 814 (1908); State v. Farnham, 35 Mont. 375, 89 P. 728 (1907).

74. State v. Stevens, 60 Mont. 390, 199 P. 258 (1921).

75. See State v. Rogers, 31 Mont. 1, 77 P.2d 293 (1940); State v. Crowe, 39 Mont. 174, 102 P. 509 (1909).

76. State v. Gleim, 17 Mont. 17, 41 P. 998 (1895); State v. Kankaris, 40 Mont. 180, 188 P. 644 (1920).

77. State v. Greeno, 135 Mont. 80, 342 P.2d 1032 (1959).

78. Thomas C. Reeves, Freedom and the Foundation (New York: Alfred A. Knopf, 1969), p. 119.

79. Hopt v. Utah, 110 U.S. 574, 584 (1884).

80. Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964).

81. Levy, "Self-Incrimination," p. 27.

82. Miranda v. Arizona, 384 U.S. 436, 467-74 (1964).

83. Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J. dissenting). Cited from Ibid., p. 466.

84. New York, Temporary State Commission on the New York Constitutional Convention, Individual Liberties: The Administration of Criminal Justice (New York, 1967), p. 21. Cited hereafter as New York Constitutional Convention Commission, Individual Liberties.

85. Cited from Ibid., note 74 at p. 21.

86. Ibid., p. 24.

87. State v. Brecht, 28 State Reporter 468 (1971).

88. Ibid., p. 473.

89. Ibid., p. 475.

90. New York Constitutional Convention Commission, Individual Liberties, p. 22.

91. Cited from Levy, "Self-Incrimination," p. 29.

92. David Fellman, The Defendant's Rights (New York: Rinehart & Company, Inc., 1958), p. 1. Cited hereafter as Fellman Rights.

93. Ibid., p. 2.

94. Ibid., pp. 2-3.

95. Ibid., pp. 3-4.

96. Ibid., p. 22.

97. Ibid., pp. 22-23.

98. Stack v. Boyle, 342 U.S. 1, 4 (1951).

99. Hudson v. Parker, 156 U.S. 277, 285 (1895).

100. Montana, Constitutional Convention of 1889, Proceedings and Debates of the Constitutional Convention (Helena: State Publishing Co., 1921), p. 254. Cited hereafter as 1889 Proceedings.

101. Ibid., p. 255.

102. Ibid.

103. Ibid., pp. 255-262.

104. State v. Vanella, 40 Mont. 326, 337, 106 P. 364 (1910).

105. Ibid., pp. 332-339.

106. Tooker v. State, 147 Mont. 207, 219, 410 P.2d 923 (1966).

107. Hurtado v. California, 110 U.S. 516 (1884).

108. Jethro K. Lieberman, Understanding Our Constitution (Greenwich: Fawcett Publications, 1968), p. 174.

109. 1889 Proceedings, pp. 99-100.

110. Ibid., p. 101.

111. Ibid., pp. 101-102.

112. Ibid., pp. 105-106.

113. Ibid., pp. 107-118, 251-253.

114. State v. Brett, 16 Mont. 360, 40 P. 873 (1895). See also State v. Cain, 16 Mont. 561, 563, 41 P. 709 (1895).

115. State v. Brett, 16 Mont. 360, 364, 40 P. 873 (1895).

116. Fellman, Rights, p. 30. Citing Rodney L. Mott, Due Process of Law (Indianapolis: Bobbs-Merrill Co., 1926), Ch. 13.

117. Cochran v. U.S., 157 U.S. 286, 290 (1894).

118. State v. Wolf, 56 Mont. 493, 185 P. 556 (1919).

119. Ibid., pp. 499-500.

120. Perry, Our Liberties, p. 8.

121. Loring, "Defendant's Rights," pp. 11-12.

122. Patton v. U.S., 281 U.S. 276, 288 (1929).

123. Ibid.

124. Duncan v. Louisiana, 391 U.S. 145 (1968).

125. Ibid., pp. 148-149. Quoting Powell v. Alabama, 287 U.S. 45, 67 (1932), In re Oliver, 333 U.S. 257, 273 (1948), and Gideon v. Wainwright, 372 U.S. 335, 343-344 (1963).

126. Ibid., p. 149.

127. State v. Mott, 29 Mont. 292, 297 (1903).

128. Loring, "Defendant's Rights," pp. 51-52.

129. State v. Logan, 27 State Reporter 647, 473 P.2d 833 (1970).

130. Ibid., p. 654. Citing State v. Bischert, 131 Mont. 152, 308 P.2d 609 (1957); Petition of Larocque, 139 Mont. 405, 365 P.2d 950 (1961).

131. Loring, "Defendant's Rights," p. 52.

132. Chessman v. Hale, 31 Mont. 577, 590 (1904). Under former Section 1110 of the Code of Civil Procedure one could waive the right only by failing to appear at the trial, by written consent, or by oral consent in open court.

133. Klopfer v. North Carolina, 386 U.S. 213 (1967).

134. Bannack Statutes Sec. 179, p. 244.

135. State ex rel. Thomas v. District Court, 151 Mont. 1, 438 P.2d 554 (1968).

136. In re Oliver, 333 U.S. 257 (1948).

137. Samuel S. Wilson, "Chaos in the Courtroom: Adequate Press Facilities for Highly Publicized Trials," University of Cincinnati Law Review 36 (1967): 210.

138. State v. Keeler, 52 Mont. 205, 212, 156 P. 1080 (1916).

139. Ibid., pp. 220-221.

140. Loring, "Defendant's Rights," p. 186.

141. Barron v. Baltimore, 7 Peters 243 (1833).

142. Powell v. Alabama, 287 U.S. 45 (1932).

143. Betts v. Brady, 316 U.S. 455 (1942).

144. Gideon v. Wainwright, 372 U.S. 335 (1963).

145. Douglas v. California, 372 U.S. 353, 357 (1963).

146. Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

147. State v. Blakeslee, 131 Mont. 47, 55, 306 P.2d 1103 (1957).

148. State v. District Court et al., 85 Mont. 215, 222-223, 278 P. 122 (1929).

149. Ibid., p. 224.

150. State v. Noller, 142 Mont. 35, 37, 381 P.2d 293 (1963).

151. Ibid., p. 38.

152. Ibid., p. 39.

153. Notes, "Confrontation & Cross-Examination in Executive Investigations," Virginia Law Review 56 (1970): 487.

154. Fellman, Rights, p. 47.

155. Fraenkel, Our Civil Liberties, p. 177.

156. Hawaii, Bill of Rights p. 109.

157. State v. Storm, 127 Mont. 414, 419, 265 P.2d 971 (1953).

158. Pointer v. Texas, 380 U.S. 400, 406 (1965).

159. Kirby v. U.S., 174 U.S. 47 (1899).

160. Ibid., P. 55.

161. Ibid.

162. Formerly Revised Codes of Montana, 1947, Secs. 94-8901 to 8909.

163. Daniel A. Rezneck, "The Rights of Criminal Defendants," The Rights of Americans: What They Are and What They Should Be, ed. Norman Dorsen, (New York: Random House, 1971), p. 433. Cited hereafter as Rezneck, "Criminal Defendants."

164. Mathew O. Tobriner, "Individual Rights in an Industrialized Society," American Bar Association Journal 54 (1968): 22. Cited hereafter as Tobriner, "Individual Rights."

165. Rezneck, "Criminal Defendant," p. 433.

166. Edmund W. Kitch, "The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition," The Supreme Court Review (1969): 202.

167. Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Sources of the Montana State Constitution, prepared by Elbert F. Allen, Montana Constitutional Convention Research Memorandum No. 4, (Helena, 1971), p. 2.

168. Cited from Robert Rutland, The Birth of the Bill of Rights: 1776-1791 (Chapel Hill: University of North Carolina Press, 1955), p. 75.

169. 1889 Proceedings, p. 125.

170. Ibid.

171. Ibid., p. 126.

172. Ibid.

173. Two amendments were made to the provision and another motion to strike it out was defeated. Ibid., p. 268.

174. Montana, Legislative Council, The Montana Constitution, Report No. 25 (Helena, 1971), pp. 14-15.

175. Montana, Constitutional Convention 1971-1972, Constitutional

Convention Commission, Constitutional Provisions Proposed by Constitution Revision Commission Subcommittees, Montana Constitutional Convention Occasional Paper No. 7 (Helena, 1971), p. 45.

176. In re Gault, 387 U.S. 1 (1967).

177. In re Bonner, 151 U.S. 242 (1894); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

178. Wall Street Journal, November 3, 1971, p. 1, 27.

179. Ibid.

180. Victor Rabinowitz, "The Expansion of Prisoners' Rights," Villanova Law Review 16 (August 1971): 1048-9. Cited hereafter as Rabinowitz, "Prisoners' Rights."

181. Ibid., p. 1050.

182. Ibid., p. 1049-53.

183. James D. Crawford, "Prisoner's Rights--A Prosecutor's View," Villanova Law Review 16 (August, 1971): 1056-7.

184. Ibid., p. 1057.

185. "Editorial," Judicature 54 (October, 1971): 93.

186. This provision is restated in the Revised Codes of Montana, 1947, Section 23-2701 (C) (2), which provides: "No person convicted of a felony has the right to vote unless he has been pardoned."

187. Letter from Brinton B. Markle to William F. Crowley, April 19, 1971.

188. Gail Ohanesian, "Restoration of Rights to Felons in California," Pacific Law Journal 2 (1971): 736.

189. Rabinowitz, "Prisoners' Rights."

190. Perry, Our Liberties, p. 236.

191. I Mary, State I, c.I. Cited from Ibid., note 102 at p. 236.

192. Sir William Blackstone, Commentaries on the Laws of England, IV, p. 379. Cited from Perry, "Our Liberties," p. 236.

193. Hubbs v. State, 133 Ind. 404, 409-410 (1893).

194. Weems v. U.S., 217 U.S. 349, 378 (1910).

195. Robinson v. California, 370 U.S. 660 (1962).

196. See Daily v. Marshall, 47 Mont. 377, 398, 133 P. 681 (1913); State ex. rel. Hardy v. State Board of Equalization, 133 Mont. 43, 319 P.2d 1061, 1063 (1957).

197. Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New Mexico, Oregon, West Virginia and Wisconsin. Four other states have abolished capital punishment except for exceptional crimes such as treason, piracy or the killing of a policeman.

198. Arizona, Colorado, Delaware, Kansas, Missouri, South Dakota, Tennessee and Washington.

199. Cited from Trevor Thomas, This Life We Take, Friends Committee on Legislation (San Francisco: 1970), p. 9. Cited hereafter as Thomas, This Life.

200. Florida, Report of the Special Commission to Study the Abolition of the Death Penalty in Capital Cases (Tallahassee: State of Florida, 1965), p. 16.

201. Dr. Thorstein Sellin, The Death Penalty and Public Safety. Cited from Thomas, This Life, p. 16.

202. Comment, "Capital Punishment," Tennessee Law Review 29 (1962): 534-550. Cited hereafter as Comment, "Capital Punishment."

203. William Hochkammer, "The Capital Punishment Controversy," The Journal of Criminal Law, Criminology, and Police Science 60 (1969): 362. Cited hereafter as Hochkammer, "Capital Punishment."

204. Comment, "Capital Punishment," p. 548. See also Thorstein Sellin, "Capital Punishment," Federal Problems 25 (1961): 3.

205. Hochkammer, "Capital Punishment," 362.

206. Ibid., p. 361.

207. Comment, "Capital Punishment," pp. 542-5.

208. Hochkammer, "Capital Punishment," p. 362.

209. Ibid.

210. Ibid.

211. In re Kemmler, 136 U.S. 436, 447 (1890).

212. Weems v. U.S., 217 U.S. 349 (1910).

213. Francis v. Resweber, 329 U.S. 459, 472 (1959) (Barton, J. dissenting opinion).

214. American Civil Liberties Union, The Death Penalty and Civil Liberties (New York: July, 1965), n.p.

215. Cited from Thomas, This Life, pp. 9-10.

216. See, e.g., Robert Rankin, State Constitutions: The Bill of Rights (New York: National Municipal League, 1960), pp. 10-11. Cited hereafter as Rankin, Bill of Rights.

217. Charles Reich, Bureaucracy and the Forests (Santa Barbara: Center for the Study of Democratic Institutions, (1962), p. 2.

218. Ibid.

219. See, for example, Garfield v. U.S. ex. rel. Goldsby, 211 U.S. 249, 262 (1908); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); F.C.C. v. Schreiber, 381 U.S. 279, 292 (1965). Cf. Ravul Berger, "Administrative Arbitrariness: A Synthesis," Yale Law Journal 78 (1969): 966. Cited hereafter as Berger, "Administrative Arbitrariness."

220. 5 U.S.C. 7-1-06 (Supp. III, 1968).

221. The (Helena, Mont.) Independent Record, November 21, 1971, p. 1. For an example of the debate on whether such actions should be judicially reviewable, see Berger, "Administrative Arbitrariness," note 9 at p. 966.

222. Note, "Constitutional Rights and Administrative Investigations: Suggested Limitations on the Inquisitorial Powers of the Federal Agencies," Georgetown Law Journal 58 (1969): 345.

223. Rankin, Bill of Rights, p. 11.

224. Tobriner, "Individual Rights," p. 22.

225. Glenn Tinder, Political Thinking: The Perennial Question (Boston: Little, Brown and Co., 1970), pp. 81-86.

226. Ibid., p. 81.

227. Ibid., p. 82.

228. Ibid.

229. Cf., Bernard Bousanquet, The Philosophical Theory of the State. Cited from Ibid., p. 86.

230. Thomas v. Collins, 323 U.S. 516 (1945). Of course, there is doubt whether this right extends to public employees. In addition, this right of itself, protects only the existence of a union, not its effectiveness.

231. Clyde W. Summers, "The Rights of Unions and Union Members," Rights of Americans, ed. Norman Dorsen (New York: Random House, 1970), pp. 591-592. Cited hereafter as Summers, "Rights."

232. For example of state constitutional recognition of this right, see Florida Const. Art. I, Sec. 6; Missouri Const. Art. I, Sec. 29; New Jersey Const. Art. I, Sec. 19; New York Const. Art. I, Sec. 17.

233. Summers, "Rights," p. 592.

234. Ibid., pp. 592-593.

235. Ibid., p. 616.

236. Ibid.

237. Steele v. Louisville and Nashville Railway, 323 U.S. 192, 199 (1945).

238. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Radio Officers Union v. NLRB, 347 U.S. 17 (1958).

239. Hughes Tool Co., 104 N.L.R.B. 318 (1953).

240. Local 12, Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).

241. Summers, "Rights", p. 609.

242. Ibid.

243. Ibid., pp. 616-617.

244. Michael Walzer, "Civil Disobedience and Corporate Authority,"

Power and Community, eds. Philip Green and Sanford Levinson (New York: Random House, 1969), p. 225.

245. Alfred C. Emery, "An Oath of Freedom," Utah Law Review (1971): 209.

246. Ibid., pp. 226-227.

CHAPTER VII

PRIVACY AND ITS INVASION

Volumes have been written in recent years concerning the potential of excessive invasion of citizen privacy by the same advanced technological society that sends men into space. Aspects of the problem discussed in this report include the traditional constitutional safeguards of the privacy of the home (the prohibition of unreasonable searches and seizures), a specific contemporary privacy issue (wiretapping and electronic surveillance) and the potential of a broad statement designed to aid the judiciary in deciding privacy questions (the right of privacy).

SEARCHES AND SEIZURES

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing. [Montana Const. Art. III, Sec.7]

History

The Bill of Rights of the 1776 Constitution of Virginia contained what one commentator has called "a notable advance in the protection of personal security."[1] Section 10 of that Bill of Rights declared:

> that general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

This forerunner of contemporary search and seizure clauses was antedated by a general rule of the English common law, which prohibited the use of search warrants and warrants of arrest that did not describe in detail the place to be searched or things or persons to be seized.[2] In his famous Commentaries, Blackstone explained this rule by saying:

> A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special is illegal and void for its certainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests is a fact to be decided on a subsequent trial; namely whether the person apprehended thereupon be really guilty or not.[3]

To this rule, Parliament chose to make exceptions to cover situations in the American colonies. The first exception was the writ of assistance, which was used for the enforcement of various trade acts. It permitted officers of the Crown to break and enter at will and seize goods deemed contraband. Although these writs were supposed to expire, they were renewed by Parliament. This gave occasion for James Otis' famous argument against the writs. He argued that they violated the notion (first expressed by Sir Edmond Coke) that "a man's home is his castle." Otis was not opposed to a warrant where the ground for suspicion previously was sworn to; however, he said, any incompetent or oppressive official could abuse the general warrant. Again relying on Coke, Otis argued that the writs were contrary to natural law and the English constitution and accordingly, even though they were acts of Parliament, they were void. Despite a good deal of protest against the writs, they were later authorized by the Townshend Revenue Act of 1767. That act was one of those condemned by members of the First Continental Congress as violating the rights of Englishmen--rights to which they believed all colonists were entitled.

The other exception Parliament permitted to the common law rule against general warrants involved granting a warrant which could be used to search for and seize allegedly libelous publications and to arrest seditious persons. Although the act authorizing this practice expired in 1695, royal officials continued to use this type of warrant until 1765 when an English court ruled against it.[4]

Thus, it is not surprising that in drafting the Virginia Bill of Rights, George Mason--who later was to suggest a federal Bill of Rights--set forth the principle of opposition to general warrants. The colonists had experienced the abuse of the general warrant at the hands of zealous royal officials; understandably, then, when James Madison offered his Bill of Rights amendments to the First U.S. Congress, a search-and-seizure provision was among them. It read:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[5]

To be sure, there was a considerable number of state precedents of this sort. All approximated the current wording of the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

Nearly every state constitution contains wording of this sort limiting the scope of acceptable searches and seizures and defining the proper procedure to obtain a warrant. A brief look at the kinds of decisions handed down under these provisions follows.

The Supreme Court and the Fourth Amendment

In 1886, the United States Supreme Court tied the Fourth Amendment to the Fifth Amendment by saying that an unreasonable search and seizure was the same as forcing a person to be a witness against himself. The court also said that an actual entry upon one's premises was not required to constitute unreasonable search and seizure--that forcing a party to produce his records was sufficient. Accordingly, the court prohibited the seizure of a man's papers in an effort to use them to convict him of crime. Perhaps more important, the court said:

> Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.[6]

One commentator has written that it may seem remarkable today

> that civil liberties-wise these constitutional provisions [the Fourth Amendment] reflected only hollow rhetoric during the 19th and the first half of the 20th centuries. The police regularly burst through doors and ransacked premises without bothering to obtain a warrant and people were sent to jail on the basis of the incriminating data thereby discovered. True enough, the invading police officers might be sued for trespassing on private property, but this was little solace for the imprisoned victim of their invasion.[7]

The Supreme Court itself admitted as late as 1961 that "trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies."[8]

It was not until 1914 that the court, saying it no longer could countenance a direct violation of the defendant's constitutional rights, held that any material obtained as a result of an unreasonable search by federal officials was inadmissible as evidence in a federal court.[9] Although the Fourteenth Amendment and its guarantee of due process of law and equal protection of the laws to citizens of every state were nearly fifty years old, the states were not required to abide by this exclusionary rule. That is, the product of an unreasonable search and seizure by a state officer was still admissible as evidence in state courts.

The question of the admissibility of unconstitutionally obtained evidence into state courts was faced squarely by the court in 1949.[10] Justice Frankfurter, writing the opinion for the court, acknowledged that "the security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth amendment--is basic to a free society." However, to the question of whether unconstitutionally obtained evidence could be admitted in the state courts, the court answered yes. Thus, although ruling privacy to be basic to a free society, the court also ruled that the states did not have to follow the federal example enunciated in 1914.[11]

In 1961, the court reversed its stand. In Mapp v. Ohio, it ruled that state courts could not use any evidence acquired in violation of the Fourth Amendment right against unreasonable search and seizure. Justice Clark, who wrote the opinion of the Court, said "we can no longer permit that right to remain an empty promise."[12] Thus, nearly fifty years after the federal Fourteenth Amendment, the exclusionary rule was applied to the states. As E. F. Roberts noted, "in 1961 the law finally put

an effective halt to police invasion of premises unless they were armed with a warrant or exceptional circumstances obtained."[13]

On the other hand, Roberts added, there is evidence that the 1914 court decision was ahead of its time. It probably is true that "the citizenry as a whole . . . saw nothing untoward in jailing some culprit should a police raid 'get the goods on him' because, after all, the poor bugger was guilty."[14] That the decision perhaps predated its understanding and acceptance also indicated by the so-called "silver platter" doctrine. After the 1914 decision was announced and until 1960, the court held that federal prosecutors could use evidence that was obtained illegally by state and local low enforcement officers. The logic of this doctrine was that state and local officials could aid federal officials in circumventing the exclusionary rule of the 1914 decision by gathering the evidence in any manner, legally or otherwise, and presenting it on a "silver platter" to federal officials. The practice was not prohibited until 1960 in Elkins v. U.S.[15] The logic of the theory roughly parallels that of the "two sovereignties" rule discussed in the double jeopardy portion of this report.

That the states now are quite securely bound by federal decisions on the exclusion of improperly obtained information is indicated by a 1964 decision in which the court, in the words of one commentator, "made it clear that the Mapp rule must be obeyed and that no shabby subterfuges would be tolerated."[16] The Montana Supreme Court stated this principle in 1969 in a case discussed below.

A possible method of accommodating the exclusionary rule would be to state it explicitly in the state constitution. An example of the type of wording that would accomplish this is seen in a proposed New York revision, in which the following words were added at the conclusion of the search and seizure provisions: "Evidence obtained in violation of this section shall not be admissible in any judicial, legislative, or administrative proceeding" [Proposed New York Constitution of 1967, Art. I, Sec. 4 (c)].

Probable Cause

One of the main requirements for a reasonable search and seizure is that probable cause be shown. The U.S. Supreme Court in 1949 attempted the following definition of probable cause:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These

> are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . .
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C. J., said for the Court more than a century ago . . . . Since Marshall's time it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed . . . .
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice [case citations omitted].[17]

Interesting questions arise in the case of a search conducted without a warrant. The court has attempted on a number of occasions to square warrantless searches with the probable cause requirement in an effort to stake out some grounds for reasonable searches without warrants. Until recently, the standards governing the scope of a search incident to an arrest were as stated in the Harris and Rabinowitz decisions.[18] These two decisions expanded the permissible scope of searches incident to arrest beyond previous standards by permitting searches in cases where traditional justifications--possible

destruction of evidence, officer protection or prevention of the suspect's escape--were absent.[19]

However, the court in 1969 reassessed the standards for a permissible search incident to arrest and concluded, generally, that a search could be made only of the individual and the area within his immediate control.[20] One commentator has suggested the effect of this 1969 ruling is quite broad:

> [A] search of the area under the immediate control of another person, not under arrest, probably will be permitted if that person is deemed to be an extension of the arrestee's physical presence. It is also possible that the police may be permitted an over-all view of the other rooms in the premises. This view would be restricted to a cursory glance through each room for possible accomplices. A detailed search outside the area of the defendant's immediate control would not be permitted. It appears that these new standards will also apply to automotive searches and this should stop the police from completely searching the car every time they made an arrest.[21]

The Fourth Amendment in Civil and Administrative Proceedings

The Fourth Amendment's exclusionary rule has not been construed to apply to evidence seized by private persons or administrative agencies and officers not charged with law enforcement. But recent rulings indicate a move is being made to extend the protection to administrative proceedings. For example, if an administrative proceeding is quasi-criminal in nature and its potential result would be to penalize a person for a violation of the law, evidence submitted is subject to Fourth Amendment-based scrutiny.[22] By 1967 Supreme Court rulings, it was established that a search conducted by a regulatory agency in nonemergency conditions required a search warrant unless the owner or tenant consented to the search.[23]

A possible constitutional alternative in this area is some explicit guarantee that the unreasonable search and seizure provisions apply to all criminal, civil and administrative proceedings and that any information obtained in violation of such provisions would not be admitted as evidence in a criminal, civil or administrative proceeding. This was done in the previously discussed New York constitutional proposal.

Police Detention and Investigation

A recent area of controversy in search and seizure concerns the police investigatory technique of stopping and frisking a suspected lawbreaker. Typically, this practice is employed without a warrant and with less than probable cause. Usually the practice involves holding a person and some of his property--an automobile, for example--for the purpose of interrogation without making an arrest. Obviously, this law enforcement technique poses a persistent problem for civil liberties.

The "stop and frisk" practice has been the subject of heated controversy and has come under judicial scrutiny as to its constitutionality. Montana currently has no statutory authority for stop and frisk, perhaps because the practice ordinarily is sought for large urban areas and is not so easily justified in more rural states. An example of a stop and frisk statute can be found in New York. That statute, enacted in 1962, authorizes a police officer to stop a person in a public place for brief questioning if the officer has reasonable suspicion that the person has committed a felony or one of a number of specified misdemeanors. In addition, the officer can frisk the suspect for a weapon if he reasonable suspects danger to himself.[24]

The most controversial aspect of this practice is the fact that searches can be conducted in instances where there is less than probable cause. In 1968, the U.S. Supreme Court wrestled with this problem in two cases. In the first of these, Terry v. Ohio, the court upheld the practice of stop and frisk even when employed without probable cause.[25] In doing so, the court ruled that the police must secure a warrant whenever practicable, but that to require a warrant in all cases would be unreasonable. Whether a search and detention is justifiable rests on whether the officer acted with reasonable prudence. The guidelines and circumstances which the court announced for determining this reasonableness for a search include:

> (a) Though the police must whenever practicable secure a warrant to make a search and seizure, that procedure cannot be followed where swift action based upon on-the-spot observations of the officer on the beat is required.
>
> (b) The reasonableness of any particular search and seizure must be assessed in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action taken was appropriate.

(c) The officer here was performing a legitimate function of investigating suspicious conduct when he decided to approach petitioner and his companions.

(d) An officer justified in believing that an individual whose suspicious behavior he is investigating at close range is armed may, to neutralize the threat of physical harm, take necessary measures to determine whether that person is carrying a weapon.

(e) A search for weapons in the absence of probable cause to arrest must be strictly circumscribed by the exigencies of the situation.

(f) An officer may make an intrusion short of arrest where he has reasonable apprehension of danger before being possessed of information justifying arrest.[26]

An indication of the grounds for a reasonable seizure also was offered:

(a) The actions of petitioner and his companions were consistent with the officer's hypothesis that they were contemplating a daylight robbery and were armed.

(b) The officer's search was confined to what was minimally necessary to determine whether the men were armed, and the intrusion, which was made for the sole purpose of protecting himself and others nearby, was confined to ascertaining the presence of weapons.[27]

Justice Douglas dissented from the opinion for one reason at some length:

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause" to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed . . . . Had a warrant been sought, a magistrate would, therefore, have been

unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.

In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. . . .

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act". . . .

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.[28]

Apparently only a few states have stop and frisk statutes; however, the practice is fairly widespread and may even be employed in Montana, despite the lack of statutory authorization. Several alternatives exist for a state constitutional provision on the matter. Stop and frisk could be expressly authorized, prohibited or authorized only to the extent necessary to discover a concealed weapon.[29] Whatever choice is made, the question of probable cause lies at the heart of the matter.

Montana's Search and Seizure Provisions

The Montana Supreme Court on several occasions has interpreted the search and seizure provisions of Article III, Section 7 of the Montana Constitution. In 1912, the court acknowledged that "because [the search warrant] . . . is a process subject to much abuse, it has in this country generally been limited in its use by constitutional restrictions."[30] A host of state cases have dealt with the requirement of probable cause, the definition of unreasonable searches and seizures and waiver of the right to be free from unreasonable searches and seizures. In 1969, the court ruled unanimously that an improper search warrant renders any information obtained inadmissible in court. In doing so, the court said:

> [A] search is lawful or unlawful when it starts and does not change that character from its success . . . . Thus a search unlawful in its inception is not validated by what it turns up.[31]

In announcing that the exclusionary rule applied to illegal searches and seizures, the court said:

> Here entry into defendant's residence was accomplished by means of a void search warrant. Irrespective of whose testimony among the State's witnesses is accepted as to the events and their sequence following the opening of the door in response to Officer McDowell's knock, one fact is crystal clear--Officer McDowell had the void search warrant in his hand and used it as authority for entry into defendant's residence. An entry accomplished by means of void process is an illegal entry.[32]

Citing Mapp, the court went on to say:

> Evidence secured as a result of an illegal search and seizure is not admissible in evidence at the

> trial of a person charged with crime in a state court.[33]

In addition to these court rulings, the legislature has enacted statutory provisions embellishing the constitutional provisions of Article III, Section 7 on searches and seizures. These statutes, of course, remain subject to the state and federal constitutional provisions; they are found in Chapter 7 of Title 95 of the Revised Codes of Montana, 1947. Section 95-701 authorizes searches and seizures as an incident to a lawful arrest, with the consent of the person to be searched, by authority of a valid search warrant and "under the authority and within the scope of a right of lawful inspection granted by law." Other sections define the scope of a search incident to an arrest, the scope and grounds of a search warrant, the procedure to be followed in executing the warrant and procedures for handling any property seized. Section 95-1806 of the Codes outlines the procedure for a motion to suppress illegally seized evidence at a trial.

WIRETAPPING AND ELECTRONIC SURVEILLANCE

It is not difficult to find diverging opinions on the use and potential abuse of wiretapping and electronic surveillance. Those supporting the use claim it is an essential or at least very effective tool for law enforcement. From the opposite side come replies such as that of Justice Douglas:

> The truth is that wiretapping today is a plague on the nation. It is a far more serious intrusion on privacy than the general writs of assistance used in colonial days. Now all the intimacies of one's private life can be recorded. This is far worse than ransacking one's desk and closet. This is a practice that strikes as deep as an invasion of the confessional.[34]

Both wiretapping and electronic surveillance have a long history, being used during the Civil War by the Blues and the Grays to intercept military secrets. So common was the practice by the end of the nineteenth century that Illinois and California had enacted statutes prohibiting telephone wiretapping.[35]

In 1927, a wiretap case reached the U.S. Supreme Court.[36] This case is discussed at some length as it contains most of the critical questions of the wiretap debate. The question at issue was whether the use of evidence obtained by tapping a private telephone conversation was a violation of the Fourth and Fifth amendments to the U.S. Constitution. The

phone tap had been used by federal agents in Seattle to enforce the National Prohibition Act against what was alleged to be a conspiracy to import large quantities of liquor into the country. In conducting their investigation, four federal authorities tapped several telephone lines; in fact, the core of the prosecution's evidence was gathered in this manner. During the trial, the evidence was admitted in the form of stenographic notes; it was not recorded on tape. The defendants objected to the admission of the evidence, saying wiretapping violated the Fourth and Fifth amendments. The Washington District Court and the Ninth Circuit Court of Appeals both held that such was not the case and that the information could be used as evidence; the U.S. Supreme Court agreed with the lower courts by a 5-4 decision. Chief Justice Taft, writing the majority opinion, said it was significant that the interception of the message was "made without trespass upon the property of the defendants." He said tne taps were not made within the homes of the defendants, but were made along the course of public telephone lines.[37] In an amicus curiae brief, the Pacific Telephone Company, American Telephone and Telegraph Co., U.S. Independent Telephone Association and Tri-State Telephone and Telegraph Co. argued that the telephone's function was to enable two persons to converse privately as if they were together personally and that "a third person who taps the lines violates the property rights of both persons then using the phone and of the telephone company as well [emphasis added]."[38] Comparing the use of a wiretap to the strictly prohibited instance of invading communications by mail, the companies argued:

> The telephone companies deplore the use of their facilities in furtherance of any criminal or wrongful enterprise. But it was not solicitude for law breakers that caused the people of the United States to ordain the Fourth and Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the Government . . . . Writs of assistance might have been abolished by statute, but the people were wise to abolish them by the Bill of Rights.[39]

The court majority did not agree with that position, however, and argued:

> The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here.

> There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses of the defendants . . . . The language of the [Fourth] Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.[40]

The majority opinion continued saying Congress could protect the secrecy of telephone messages by legislation, but that the court could not do so within the Fourth Amendment. Thus, the court accepted the argument of the government brief that

> if . . . obtaining evidence by tapping wires is deemed objectionable governmental practice, it may be regulated or forbidden by statute, or avoided by officers of the law, but clearly the Constitution does not forbid it unless it involves actual unlawful entry into a house.[41]

Four justices, Brandeis and Holmes among them, dissented strongly from this opinion. Justice Holmes, answering the government's brief contention that the language of the Fourth Amendment applied only in cases of actual trespass, said: "I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."[42]

His contention suggests the 1886 Boyd decision counseling "liberal construction" of the Fourth Amendment.[43] Holmes also argued that although criminals should be detected, the government should not engage in unlawful violations of privacy to get evidence. "We have to choose," he said, "and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[44]

Justice Brandeis began his now-famous dissent by noting that the government admitted that if its practice of wiretapping were deemed a search and seizure under the Fourth Amendment, it would be barred as unreasonable and would not be admissible. Seeing that the government's argument was based on a strict interpretation of the language and history of the Amendment, Brandeis went to considerable lengths to show the occasions on which the Constitution had been interpreted in ways probably not envisioned by the Founding Fathers. He relied mainly on cases in which the court itself had refused to place overly literal interpretations on due process clauses and stressed that

> a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.
>
> When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify--a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life--a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.[45]

Brandeis went on citing other court decisions and concluded:

> From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper [a transcript of a wiretap] without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined--as where they are testified to by a federal officer who thus

> saw the document or where, through knowledge so obtained, a copy has been procured elsewhere--any such use constitutes a violation of the Fifth Amendment.[46]

Perhaps the most famous statement from his dissent best sums up his position:

> The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[47]

Holmes and Brandeis were joined by Justices Stone and Butler in dissent.

In 1935, Congress responded to the decision by enacting the Federal Communications Act. Section 605 of the act made it unlawful for any person to intercept or divulge the contents of any communication unless authorized by the sender.[48] Federal agencies, especially the Justice Department, immediately interpreted the statute to prohibit only <u>both</u> interception and divulgence; one or the other by itself would not violate the statute, according to their reasoning. According to Senator Long, the Department of Interior and other federal agencies engaged in taps after the act as a routine means of law enforcement.[49] Thereafter, Presidents Roosevelt and Truman, concerned with national security during World War II, issued memorandums giving the attorney general discretion to use wiretaps and electronic surveillance on anyone suspected ob being subversive. The memorandums requested that the investigations be kept "to a minimum and be limited insofar as possible to <u>aliens</u> [emphasis added]."[50] This approval of wiretapping

in cases of "national security" continues today, although the Federal Communications Act prohibits any information gained thereby from being admitted as evidence in a trial.

In 1937, the U.S. Supreme Court ruled to this effect in Nardone v. U.S.[51] The court said information obtained as a result of a tap was inadmissible in federal court.[52] A subsequent decision in the same case reaffirmed this ruling and added to it the "fruit of the poisonous tree" doctrine;[53] in order for evidence to be acceptable in a court, it had to be secured from independent sources and had to be free from the taint of a wiretap.[54]

All this was lost on advocates of potential invasion of privacy by other electronic means. A line of Supreme Court cases developing through World War II to the present holds that wiring an informer for sound is not an unreasonable search and seizure.[55] On the other hand, an example of the use of electronic surveillance equipment that does constitute an unreasonable search and seizure is the case in which a "spike mike" is driven into the wall of a home.[56] It seems, however, that the Federal Communications Act, as interpreted, does not protect against the use of wired informers and hidden microphones, even if they are carried into a private home.

More recent U.S. Supreme Court decisions have further outlined the issues of proper and improper electronic surveillance. In 1967, the court held that information obtained by electronic surveillance would be inadmissible as evidence unless these conditions were satisfied: (1) authorization had to be obtained from a court of competent jurisidiction; (2) strong probable cause that a crime had been or was being committed must be established, and (3) the necessity for immediately obtaining the evidence must be stipulated. Without these conditions, the defendant's rights under the Fourth and Fifth amendments had been violated.[57]

In the same year, in Katz v. U.S.,[58] the Supreme Court acknowledged the above-discussed dissenting opinions in the 1927 Olmstead case and extended the Fourth Amendment to cover oral statements. In doing so, the court held that the physical trespass required by Chief Justice Taft in the majority opinion of Olmstead no longer was controlling. In the Katz case, the FBI, had used electronic listening and recording devices on a public telephone booth frequented by the defendant. Consistent with its doctrine that the entirety of an individual's surroundings were protected from invasion, the court disallowed admission of the information obtained.

On the heels of these two decisions and the disturbances following the assassination of Martin Luther King, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[59] This act sets severe civil and criminal penalties for all surveillance not expressly authorized by the act. The attorney general of the United States or his designated deputy can seek authorization for interception from a federal judge of competent jurisdiction. Certain "emergency situations"--"conspiritorial activities" involving "national security" or activities related to organized crime--can permit interception prior to a proper court application.

The application for an interception authorization must include: (1) the identity of the officer making the surveillance; (2) a statement of facts establishing probable cause that a crime is being committed; (3) a description of the nature of the surveillance; (4) a description of the place of surveillance; (5) the identity of the person whose communications are to be intercepted; (6) a statement concerning other investigative procedures and why they cannot be employed, and (7) a statement of the period of time of surveillance.[60] The judge receiving the application may grant authorization if three facts have been established: (1) probable cause that surveillance will uncover evidence of the specified crime; (2) normal procedures are of no avail, and (3) probable cause that the place under surveillance is likely to be used in connection with the offense.

The statute also provides for the style of the court order, for the suppression of unauthorized or improper surveillance, for notification of the person under surveillance within ninety days and for recovery of civil damages in cases of improper surveillance.[61]

Since the enactment of Title III, the Supreme Court has ruled that in all cases of electronic surveillance, the defendant has the right to inspect all information obtained to determine if it made a substantial contribution to his prosecution. If the evidence offered is not independent in origin or free of the taint of illegal electronic surveillance, it cannot be accepted in court. The court believed that the defendant's right to scrutinize the fruits of electronic surveillance and his possible subsequent objections to their admission were the only ways a court could rule on the information when it was offered as evidence.[62]

Montana and Electronic Surveillance

Section 2516(2) of Title III of the Omnibus Crime Control Act permits state legislatures to grant power to the attorney general

or to principal prosecuting attorneys of the subdivisions of the state--including cities--to seek court authorization for electronic surveillance in conformity with the Crime Control Act. A long list of offenses for which such authority is available is given in that section: murder, kidnaping, gambling, robbery, bribery, extortion, dealing in narcotic drugs, marijuana or other dangerous drugs and other crimes.

Montana has several statutes pertaining to electronic surveillance. Section 94-3321, 94-3322 and 94-35-200 of the Revised Codes of Montana, 1947, deal with telegraphic communications, prohibiting their disclosure or alteration by persons or devices. Section 94-3203 prohibits any person from tapping telephone or telegraph lines by any means. Two other sections (94-35-274 and 94-35-275) prohibit reproduction of a conversation by hidden electronic or mechanical means. The first of the two (274) stipulates that reproducing conversation by such means is a misdemeanor; the latter (275) states that the former (274) does not apply to public officials in performance of duty or to public meetings.

In the 1971 Montana Legislature, the Senate killed a bill which would have authorized the attorney general and the fifty-six county attorneys to engage in electronic surveillance. In general, the bill was similar to the Omnibus Crime Control Act.[63] As a result, only federal authorities have power to engage in electronic surveillance in Montana at present.

The Controversy

Arguments for and against wiretapping authorization perhaps can best be seen in a detailed reading of the congressional debates on Title III of the Omnibus Crime Control Act of 1968.[64] When Title III came out of committee to the floor of the U.S. Senate, an effort was made to specifically prohibit all wiretapping and eavesdropping at the state level. The rationale behind this effort was that the authority granted to states to enact wiretap laws was too broad--that it could permit even city attorneys to seek authorization for wiretapping for a list of offenses which was too open-ended (crimes dangerous to life, limb or property and all crimes punishable by imprisonment of one year or more).[65] Senator Long had printed in the Congressional Record a tabulation of the crimes for which states could secure wiretaps; the list covered a full page.[66] Long argued this was much too broad a grant of authority to state officials.

Arguments offered by proponents of wiretapping and electronic surveillance are several. Some contend that law enforcement

officials should be free to use all modern scientific aids to apprehend criminals. Attorney General Mitchell is in favor of electronic surveillance and believes it to be one of the most effective tools of modern law enforcement;[67] former Attorney General Ramsey Clark believes it should be strictly limited to use at the federal government level in cases of national security.[68]

Additional arguments for wiretapping authority include: it is the only means for uncovering organized criminal activity and official corruption; other methods of detection are more expensive in dollar terms, and adequate safeguards can be built into the wiretap authorization procedure.

Arguments against such authorization include: wiretapping is a grave violation of the right of privacy considerably more heinous than the colonial writs of assistance; especially at the state and local levels, wiretapping authority is subject to considerable abuse, requirements for court orders and probable cause notwithstanding; wiretapping is necessarily indiscriminate, despite all possible safeguards, in that it intercepts all conversations on a given line or in a given place regardless of their connection with any suspected criminal activity; and excerpts taken out of private conversations easily can become distorted in meaning and, therefore, be misleading.

Both sets of arguments deserve much more detailed assessment before any solution should be considered.[69]

The Solution

Several resolutions of the wiretap controversy at the level of the state constitution are possible. The Maryland Constitutional Convention of 1968 proposed the following provision (Section 1.05) to meet the rule set forth in the Katz decision discussed earlier:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, interceptions of their communications, or other invasions of their privacy, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted. [New changes are underlined].

This provision is similar to Article I, Section 12 of the Florida Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communications to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

The New York Constitutional Convention of 1967 proposed a more detailed provision [Art. I, Sec. 4], which included the exclusionary rule:

> The right of the people to be secure against unreasonable interception of telephone, telegraph and other electronic communications and against unreasonable interception of oral and other communications by electric or electronic methods shall not be violated, and no order for such interception shall issue but upon probable cause supported by the non-delegable, personal oath or affirmation of the attorney general or a district attorney and the affidavit of a person having personal knowledge of the facts, showing reasonable grounds to believe that evidence of a particular crime or information leading to the apprehension of the perpetrator thereof may be thus and not otherwise reasonably obtained, and particularly describing the person or persons whose private communications are to be overheard and the place and reason for such interception.
>
> Such an order may be issued only by the presiding judge of the appellate division in the judicial department where it is to be executed, or by one associate judge thereof designated by the presiding judge for such purpose, or by one supreme court judge so designated in each judicial district.
>
> Orders or warrants issued pursuant hereto shall be limited to a reasonable period of time, and no such order shall authorize an interception except as permitted by statute.

> Evidence obtained in violation of this section shall not be admissible in any judicial, legislative or administrative proceedings.

The New York proposal was defeated with the rest of the revision package. Article I, Section 12 of the New York Constitution therefore stands as adopted in 1938:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

Another alternative--which could also be directed at all electronic surveillance--is the outright prohibition of wiretapping contained in Article II, Section 10 of the Puerto Rico Constitution: "Wiretapping is prohibited."

Whatever kind of solution is considered, the potential for abuse of an electronic surveillance authorization is immediate and clear. If there is certainty that such an authorization could be frozen into the state constitution without violating constitutional rights of privacy, there is yet another line of questions that must be answered: Does Montana need wiretap authorization? Are the crimes for which such authorization is sought--organized crime and crimes against the national security--more properly federal matters or, at least, more peculiar to more urbanized states? Whatever the resolution of the issue, if it is as divisive an issue as the Gallup Poll seems to indicate, it might best be placed on the ballot separate from the body of any new constitution.[70]

RIGHT OF PRIVACY

In 1890, Louis Brandeis and an associate, Samuel Warren, noting that "social and economic changes entail the recognition of new rights" and that the common law is in "eternal youth," announced that "the right to life has come to mean the right to enjoy life--the right to be let alone; the right to liberty secures the exercise of extensive civil privileges . . . ."[71] Eighty years later this "right to be let alone" or the "rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place, and circumstances to communicate with others"[72] is one of most compelling issues in the civil liberties field.

A contemporary reversal on the right has been accomplished to such an extent that a 1928 dissenting opinion of Justice Brandeis is now much-accepted; it is also praised as "the most celebrated judicial statement of the privacy protections."[73] As Brandeis put it:

> The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness . . . . They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man.[74]

Those statements of Brandeis, crucial as they were to the contemporary development of the broad right of privacy, are by no means the earliest indications of that right. Early hints of a legal right of privacy are found, for example, in a compilation of the Oral Law of Ancient Israel collected around 200 A.D. The medieval political philosopher, Maimonides, declared in 1180 that "the harm of being seen in privacy is a legal wrong." More interesting is the fact that the Roman word "injuria" had a meaning as "the willful disregard of another's personality;" similarly, the Greek "contumelia" had a meaning as "the infringement of another." From these and other sources the potentially broad concept of privacy takes its meaning.[75]

There was, apparently, no recognition of an enforceable right of privacy in the writings of the seventeenth and eighteenth century English political philosophers, and some believe there were no significant early developments in English history or the common law dealing with the right. If this is true, the right would not be typical of most American rights, which were derived more or less directly from English law.

The 1890 Brandeis-Warren essay mentioned above "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law."[76] Several commentators

have credited it with adding a new chapter to the law and with having initiated a new field of jurisprudence. The core of the argument in the essay is the necessity of a legal protection of the right of privacy. Brandeis and Warren argued that such a right did exist in the common law of England but that it was misunderstood as a property or contract right. That they are on the right track is indicated by E. F. Roberts who states:

> Within the context of the [Industrial] Revolution, the idea that a home was a castle had little enough to do with civil liberties of privacy in any personal sense. It was an economic idea in the sense that the castle syndrome was part of a particular ideology structuring the society upon incipient laissez-faire lines . . . . Thus it is that the house was sacrosanct, not in terms of privacy per se, but as an island of unregulated industry which formed the nucleus of the incipient Industrial Revolution then brewing.[77]

More important, Brandeis-Warren urged that such a right should be extended beyond the protection of such tangibles as have the attributes of property to the right of peace of mind in the security of "intangible factors of life."[78]

Largely in response to this essay, the right of privacy has grown to the point where it is recognized in well over half of the states. Montana is among those states.[79] A recent Montana decision of the right of privacy and self-incrimination, approvingly cites a 1947 Montana case which said:

> "The common law has always recognized a man's home as his castle, impregnable, often, even to its own officers engaged in the execution of its commands" . . . . The "right of privacy" is embraced within the absolute rights of personal security and personal liberty . . . . The basis of the "right of privacy" is the "right to be let alone" and it is "a part of the right to liberty and pursuit of happiness . . . ."[80]

In the 1947 case, the court also acknowledged:

> [T]he type of cases in which the right of privacy has been recognized vary so widely that it might be concluded that this supposed right is nothing more than a catch-all to take care of the outer fringes of tort and contractual liability, and that it is not the product of any underlying general principle. The typical privacy cases are those involving the display, sale, or publication of one's portrait, the public use of one's name, oppressive publicity in connection with the collection of debts, and wiretapping and

> other forms of eavesdropping. Superficially, these cases may seem to involve entirely different principles and considerations. Yet there is a pervading element, common to all the cases, of outraging one's feelings by depriving him of the privacy which most normal persons desire and have a right to demand, whether this deprivation is effected by publishing one's name or picture in an advertisement or by tapping one's telephone line or installing a detectophone so as to listen secretly to one's conversation with family or friends.[81]

One author noted that the "decisions of the [U.S.] Supreme Court involving the right to privacy or containing extensive references to that right have been part of the staple fare of constitutional litigation for many decades."[82] However, the author of this statement evinced little satisfaction with the way the court had interpreted the right. He said: "in short, the right to privacy now means nothing more than a diminishing protection against unreasonable searches and seizures."[83]

All this was changed, however, when, in a 1965 decision, Griswold v. Connecticut, the U.S. Supreme Court recognized a federal constitutional "right of privacy" independent of the explicit guarantees of the Bill of Rights. In holding unconstitutional a Connecticut statute forbidding the use of, or counselling the use of, contraceptives, the case used the previously discussed penumbra doctrine. The opinion stipulated a right of marital privacy that is found in the penumbras of various provisions of the Bill of Rights. These "rights of privacy and repose" and "zones of privacy" are said to "emanate" from the First, Third, Fourth, Fifth and, more especially, the Ninth amendments to the U.S. Constitution.[84]

The main features of the court-delineated right of privacy can be seen by reviewing some of the decisions made under the various amendments mentioned in Griswold. Under the First Amendment, the court has articulated a right of privacy in association. This notion was used to strike down membership disclosure requirements imposed by Southern states on certain unpopular political organizations, notably the National Association for the Advancement of Colored People (NAACP).[85] A notion of "political privacy" also has evolved in response to the impertinence of certain congressional investigations.[86] The right to remain silent may be expanding, given recent Supreme Court decisions invalidating compulsory flag salute requirements and reading of the Bible in public schools.[87]

The Fourth Amendment has been applied to protect the privacy of the person and his home from unreasonable intrusions and seizures.

This right to the security of one's privacy against arbitrary intrusion by the police is now binding on the states. The Fourth Amendment right of privacy also has some bearing on electronic surveillance, as was discussed in the essay on wiretapping and other electronic interceptions of communications. The applicability of the Fifth Amendment to the right of privacy is still in the dissent stage. Several justices have held that the Fifth Amendment, especially when coupled with the Fourth, extends a cloak of privacy to all private communications and that it makes any interception by electronic devices unacceptable.[88] This point also was discussed in the essay on wiretapping.

The contemporary situation that reinforced the direction of these decisions and the heightened concern in the area of privacy merits mention. Certainly the concern over some more formal expression of the right has intensified. As has been noted:

> [A]t the time of the Warren Brandeis article . . . the methods available for the invasion of privacy were, comparatively speaking, only in their infancy. "When Warren and Brandeis wrote in 1890, it was the unseemly intrusions of a portion of the press into the privacy of the home that was emphasized as the main source of the evil . . . the potentialities for this character of wrong are now greatly multiplied."[89]

Unpredictable progress in the development of surveillance instruments and devices stands at the head of the concern; a sizeable outpouring of literature on the uses of various devices--from the telephone tap to the newer methods of electronic eavesdropping has spread this concern to the public. The potential abuses of vast quantities of information about literally millions of American are causing increased alarm. Couple this with the increased use of computers by government and industry and the question recently asked by one commentator becomes relevant:

> Should we not be concerned about a computerized federal data center that could collect, store and distribute information about everyone of us? Although the data may be acquired in a Constitutionally sound fashion, its use could present the greatest threat to our remaining right to individual privacy.[90]

In addition, there is a mounting predisposition in the behavioral sciences to gather raw data for research. It is alleged that

> increased accessibility of data would provide better understanding of the interdependencies within our pluralistic society, leading to better informed choices among alternative programs and policies and more effective implementation of programs. Extensive utilization of raw data in the areas of manpower skills, population concentration, transportation patterns, health services and criminal activity, would enable the government to evaluate, improve, and expand existing services.

Subsequent to this overstatement of the potential application of behavioral science data to alleviate social problems, it is admitted that "these advantages . . . are accompanied by the ever-increasing intrusion into the private personality of our citizens."[91]

Thus there is good reason to consider the possibility of including a provision on the right of privacy in the state constitution. Currently, two states have such provisions: Article III, Section 8, of the Arizona Constitution and Article I, Section 7 of the Washington Constitution both read: "No person shall be disturbed in his private affairs or his home invaded, without authority of law." A provision was recommended by the Committee to Make a Study of the South Carolina Constitution in 1965: "The right of the people to be secure from unreasonable invasion of privacy shall not be violated." The Committee, in recommending that "the citizen be given constitutional protection from an unreasonable invasion of privacy by the State," said:

> This additional statement is designed to protect the citizen from improper use of electronic devices, computer data banks, etc. Since it is almost impossible to describe all of the devices which exist or which may be perfected in the future, the Committee recommends only a broad statement of policy, leaving the details to be regulated by law and court decisions.[92]

Alan Westin, one of the most perceptive commentators on the right of privacy, has suggested a broad statement of the right: "The right to privacy of persons, communication, and association shall not be abridged." This provision leaves much latitude for the courts to define the right more extensively. In addition, Westin is quite explicit on the value of a right to privacy provision in the state constitution. He states that although

> it is . . . hard to see what would be gained in real terms by a new declaration of [the] right of privacy

> by [federal] constitutional amendment . . . given our traditions of more detailed and more frequently revised state constitutions, and in light of the "little laboratory" function of state law, such a guarantee might well be considered.[93]

In striking correspondence with the above-mentioned Greek and Roman understanding of injury as an invasion of the personality is the right personality recognized in German law. Two articles in the 1949 West German Constitution state the principle. Article I (1) reads: "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority." Article 2 (1) reads: "Everyone shall have a right to the free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code."

CHAPTER VII

NOTES

1. Richard L. Perry, Sources of Our Liberties (Rahway: Quinn & Boden, 1959), p. 304. Cited hereafter as Perry, Our Liberties. See Appendix D for the provision.

2. See William S. Hodsworth, A History of English Law, 4th ed. (Boston, 1938), X: 667-668. Cited from Ibid.

3. Blackstone's Commentaries on the Laws of England, 9th ed. (London, 1783), IV: 291. Cited from Ibid., p. 305.

4. Perry, Our Liberties, pp. 305-306.

5. Ibid., p. 423.

6. Boyd v. U.S., 116 U.S. 616, 635 (1886).

7. E. F. Roberts, "The Right to a Decent Environment: Progress Along a Constitutional Avenue," Law and the Environment, ed. Malcolm Baldwin (New York: Walker and Co., 1971), p. 135. Cited hereafter as Roberts, "Decent Environment."

8. Mapp v. Ohio, 367 U.S. 643, 670 (1961) (concurring opinion).

9. Weeks v. U.S., 232 U.S. 383 (1914).

10. Wolf v. Colorado, 338 U.S. 25 (1949).

11. Ibid., p. 27. It should be noted that during that time, judicial restraint was considered "the prime virtue of enlightened judges." Roberts, "Decent Environment," p. 137.

12. Mapp v. Ohio, p. 660.

13. Roberts, "Decent Environment," p. 139.

14. Ibid., p. 136.

15. Elkins v. U.S., 364 U.S. 206 (1960).

16. Lucius J. Barker and Twiley W. Barker, Civil Liberties and the Constitution (New York: Prentice-Hall, 1970), p. 239.

17. Brinegar v. U.S., 338 U.S. 160, 175-176 (1949).

18. Harris v. U.S., 331 U.S. 145 (1947) and U.S. v. Rabinowitz, 339 U.S. 56 (1950).

19. Notes, "Search and Seizure Since Chimel v. California," Minnesota Law Review 55 (1971): 1012. Cited hereafter as Notes, "Search and Seizure."

20. Chimel v. California, 395 U.S. 752 (1969).

21. Notes, "Search and Seizure," p. 1029.

22. Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

23. Camera v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

24. New York Code of Criminal Procedure, Sec. 180-a.

25. Terry v. Ohio, 392 U.S. 1 (1968).

26. Ibid., p. 3.

27. Ibid.

28. Ibid., pp. 35-38.

29. Hawaii, Legislative Reference Bureau, Article I: Bill of Rights, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968), p. 72. Cited hereafter as Hawaii, Article I.

30. State ex rel. Streit v. Justice Court, 45 Mont. 375, 382, 123 P. 405 (1912).

31. State v. Langan, 151 Mont. 558, 567, 445 P.2d 565 (1968).

32. Ibid., p. 567.

33. Ibid., citing Mapp v. Ohio.

34. William O. Douglas, The Right of the People (New York: Doubleday and Co., 1958), p. 151. The writs of assistance were discussed earlier in the essay on searches and seizures.

35. These two states passed wiretap statutes in 1895 and 1905, respectively. This fact, plus the general outline for what follows, was taken from a summary of the dilemmas of wiretapping and surveillance written by John B. Dudis, Jr., "Electronic Surveillance: New Law for an Expanding Problem," Montana Law Review 32 (Summer, 1971): 265. Cited hereafter as Dudis, "Electronic Surveillance."

36. Olmstead v. U.S., 277 U.S. 438.

37. Ibid., pp. 456-457.

38. Ibid., p. 454.

39. Ibid., pp. 454-455.

40. Ibid., pp. 464-465.

41. Ibid., p. 452.

42. Ibid., p. 469.

43. Boyd v. U.S., 116 U.S. 616 (1886).

44. Olmstead v. U.S., p. 470.

45. Ibid., p. 473.

46. Ibid., p. 478.

47. Ibid., pp. 478-479.

48. For the text of this enactment, see 47 U.S.C. Sec. 605 (1934) and Dudis, "Electronic Surveillance," text supra note 7 at p. 266.

49. Senator Edward V. Long, The Intruders, supra note 1 at p. 138. Cited from Dudis, "Electronic Surveillance," p. 267.

50. Ibid., p. 89.

51. Nardone v. U.S., 302 U.S. 379 (1937).

52. Ibid., p. 382.

53. Nardone v. U.S., 308 U.S. 338, 341 (1939).

54. Ibid.

55. See Goldman v. U.S., 361 U.S. 129 (1942); Lee v. U.S., 343 U.S. 747 (1952); Osborn v. U.S., 385 U.S. 323 (1966), and U.S. v. White, 39 U.S.L.W. 4387 (April 5, 1971).

56. Silverman v. U.S., 365 U.S. 505 (1961) and Clinton v. Commonwealth, 204 Va. 275, 130 S.E.2d 437 (1963).

57. Berger v. U.S., 388 U.S. 41 (1967).

58. Katz v. U.S., 389 U.S. 347 (1967).

59. 18 U.S.C.A. Ch. 119, Sec. 2510-2520.

60. Ibid., Sec. 2518.

61. Ibid., Secs. 2516, 2518, 2520.

62. Alderman v. U.S., 394 U.S. 165 (1969).

63. House Bill 384, 42nd Session, 1971 Montana Legislature. See further, Dudis, "Electronic Surveillance," pp. 274-275.

64. 114 Congressional Record, pp. 14706-14745 (1968). Cited hereafter as 114 Cong. Rec.

65. The legislation introduced into the Montana Legislature in 1971 would not have permitted city attorneys to secure tap authorizations, nor did it apply to crimes endangering only property. See House Bill 384, 42nd Session, 1971 Montana Legislature.

66. 114 Cong. Rec., pp. 14707-14708.

67. Congressional Quarterly Weekly Report, Feb. 17, 1971, supra note 55 at p. 430. Cited from Dudis, "Electronic Surveillance," p. 277.

68. Ibid.

69. See New York, Temporary State Commission on the Constitutional Convention, Individual Liberties: The Administration of Criminal Justice (New York, 1967), pp. 87-92. Cited hereafter as New York Temporary Commission, Individual Liberties.

70. See Dudis, "Electronic Surveillance," p. 277, where he notes that an August, 1969 Gallup Poll "found the nation divided on wiretapping, with 46 percent favoring the practice, 47 percent opposed to the practice, and 7 percent undecided."

71. Samuel Warren and Louis Brandeis, "The Right to Privacy," Harvard Law Review 4 (December 1890).

72. Adam Carlyle Breckenridge, The Right to Privacy (Lincoln: University of Nebraska Press, 1970), p. 1.

73. New York Temporary Commission, Individual Liberties, p. 108.

74. Olmstead v. U.S., 277 U.S. 438, 478 (1928).

75. Samuel H. Hofstadter and George Horowitz, The Right of Privacy (New York: Central Book Co., 1964), pp. 9-10. Cited hereafter as Hofstadter, Privacy.

76. William L. Prosser, "Privacy," California Law Review 48 (1960): 383.

77. Roberts, "Decent Environment," p. 144.

78. Hofstadter, Privacy, p. 19.

79. See, for example, Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1947).

80. Welsh v. Roehm, 125 Mont. 517, 524, 241 P.2d 616 (1947). Cited in State v. Brecht, 28 State Reporter 468, 473 (May, 1971).

81. Ibid.

82. William M. Beaney, "The Constitutional Right to Privacy," Supreme Court Review (1962): 212.

83. Ibid.

84. Griswold v. Connecticut, 381 U.S. 486 (1965). For the Ninth Amendment application, see the concurring opinion of Justice Goldberg and the unenumerated rights essay below.

85. See, e.g., Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); NAACP v. Alabama, 357 U.S. 449 (1958).

86. See, e.g., Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957); Watkins v. U.S., 354 U.S. 178, 198-199 (1957); DeGregory v. Attorney General, 383 U.S. 825, 829 (1966).

87. West Virginia Board of Education v. Barnett, 319 U.S. 624, 642 (1943), and School District v. Schempp, 374 U.S. 203, 319 (1963) (Stewart, J., dissenting).

88. See, e.g., Osborn v. U.S., 385 U.S. 323, 340-354 (1966) (Douglas, J., dissenting); Lopez v. U.S., 373 U.S. 427, 463-471 (1963) (Brennan, J., dissenting).

89. Hinish v. Meier & Frank Co., 113 P.2d 438, 447 (Ore. 1941). Cited in Bernard Schwartz, A Commentary on the Constitution of the United States, Part III (New York: MacMillan Co., 1968). p. 173.

90. Jerry M. Rothenberg, The Death of Privacy (New York: Random House, 1969), preface. For other discussions of the invasions of the right of privacy, see Alan F. Westin, Privacy and Freedom (New York: Atheneum, 1967); Edward V. Long, The Intruders: The Invasion of Privacy by Government and Industry (New York: Frederick Praeger, 1966).

91. Hawaii, Article I, pp. 73-74.

92. South Carolina, Committee to Make a Study of the South Carolina Constitution of 1895, Final Report (Columbia: Statehouse, 1969), pp. 14-15.

93. Alan Westin, "Science, Privacy, and Freedom: Issues & Proposals for the 1970's," Columbia Law Review 66 (1966): 1231.

CHAPTER VIII

ENVIRONMENTAL PROTECTION

INTRODUCTION

In most of the areas discussed to this point, reference has been made to the attitudes of the Founding Fathers or to colonial concern about certain rights. However, in the area of constitutional environmentalism, no such general reference can be made. The draftsmen of the Constitution, with vast areas of unexplored land at hand, did not feel the press of ecological concern and consequently gave scant attention to the possibility of environmental rights. Likewise, it has been noted:

> [T]he exploitative approach toward nature is reflected in both the compendium of statutes and judicial decisions that make up the body of Anglo-American law concerned with natural resources, and in the attitudes and order of priorities which the bench and bar have brought to bear on legal questions relating to the environment. The habit of subordinating the long-term consequences of uncontrolled exploitation of nature to short-term profits or immediate economic needs is deeply engrained in the American ethos and, indeed, in that of mankind as a whole.[1]

That is not to say there has been no concern with the environment throughout American history; in fact, a strong undercurrent of ecological thinking has been a part of American intellectual history at least since the Transcendentalists of the late nineteenth century. In another sense, the American Indians had a surprisingly well-developed environmental sensibility that remains incomprehensible to most Americans.[2] From those and other sources, the new move for the recognition of citizen rights in the protection of the environment takes its cue. Because a constitution provides a law higher and more fundamental that statutes and an expanding bulwark even a majority cannot easily overrun, it is not surprising that environmental issues should press for constitutional recognition.

Three of the issues treated below concern the constitutional enunciation of the citizen's right to a healthful environment, citizen access to the judicial process to compel the observance of environmental quality and the power and right of eminent domain.

ENVIRONMENTAL BILL OF RIGHTS

The citizen's right to a healthful environment is the new substantive provision most frequently adopted by states in recent constitutional revision. Albert Sturm has written that at least eight states have adopted some provision guaranteeing the right during the last five years.[3] In writing on the scope of a right to a habitable environment, two commentators have listed two functions such a right might perform:

> First, it should set limits, similar to those in the Bill of Rights, beyond which even a majority could not tamper with the environment. . . . Second, such a right should give all interested parties the opportunity to participate effectively in political and economic decision-making processes which, individually or collectively, have a substantial impact on the environment. [emphasis theirs].[4]

Effective participation in decision-making processes which affect the environment is the subject of the next essay. The constitutional declaration of the citizen's right to be a habitable environment is the subject of this essay.

Wording of the sort discussed in this essay is exemplified by Article XI of the Illinois Constitution. Section 1 of that article announces the public policy of the state and the duty of each person "to provide and maintain a healthful environment for the benefit of this and future generations." The same section also provides for legislative implementation and enforcement of the public policy. Section 2 is more important for these concerns:

> Every person has the right to a healthful environment. Each person may enforce this policy against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitations and regulations as the General Assembly may provide by law [emphasis added].

Many commentators writing on the constitutional right to a healthful environment have noted the possibility of deriving the right to a healthful, unsullied environment from the existing U.S. Constitution. Such an argument relies on searching out the implications of several of the explicit and derived rights and their judicial interpretation; more important, it rests on various theories of the Ninth Amendment

which admit of rights not in any way limited or denied by the explicit guarantees of the Bill of Rights. A brief look at this reasoning helps illuminate the bounds of an environmental right and its connection with the other explicit rights of the civil liberties tradition. For example, Eva Hanks argues it would not be an undue extension of the Fifth Amendment protection against deprivation of life, liberty and property to interpret it as protecting against the use of defoliants, the exposure of the citizenry to excessive radiation and the failure of the federal government to stop air pollution. She argues that

> the government could not constitutionally order that every resident of, say Kansas City, be put before a firing squad, nor for that matter every hundredth or thousandth resident selected at random. If we change the method of execution from the firing squad to slow arsenic poisoning, the result is the same. The jump from these clear cases to a constitutional right to be protected against the hazards to health and life from technology and pollution, inflicted by government or with government approval, is short and obvious.[5]

E. F. Roberts takes note of the long developing concept of the right of privacy and uses the example of a man comfortably musing over his right to be left alone as he sits in front of his picture window overlooking the lake. If, as Roberts postulates, the man must look through a maze of electric wires to view the lake that has been turned brown by sewer effluents or super-heated by thermal pollution; if he must brush the dust of a newly built cement plant from his stereo set before turning it up to drown out the noise of jet aircraft; and if this only serves to remind him of a new high-rise apartment complex being built on the last natural spot abutting the lake, his newly found right of privacy may be "really a sop thrown him in order better to let him enjoy his coming imprisonment in the castle soon to be besieged all around by an uninhabitable environment."[6] That is, the right to be insulated may not be a valuable protection in any estimation; what may be required is some form of protection that insures a healthy environment so that a "protected castle" will be worth living in.

It is also argued that the Ninth Amendment "unenumerated rights" doctrine is a possible source for the right to a healthful environment. Eva Hanks points out that "all other rights are meaningless without it."[7] And according to Justice Goldberg in the Griswold case, new rights can be found in the unenumerated

rights doctrine if one looks to the "traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] as to be ranked as fundamental."[6] To sum up this line of reasoning it is said that "there is, after all, no right to life divorced from a possibility of existence."[9] That is, the inalienable right to life and the due process right to life, liberty and property guarantee that their prerequisite--a healthful environment--be not destroyed.

The final answer to the question whether the fundamental law of the American legal system implicitly recognizes the right to a habitable environment, still is unclear, but seems to be yes. Even if it is no, however, the issue of its explicit recognition in the states' fundamental law remains the same.

Various proposals have been offered for the wording of such a right. The previously cited Illinois provision is only one example. The recently proposed Idaho Constitution [Art. I, Sec. 1] placed the citizen's right to have his environment protected in the inalienable rights section, together with the more traditional rights to life, liberty, property, and another new right, privacy. The California Assembly Select Committee on Environmental Quality recommended that the California legislature place on the ballot a constitutional amendment to effect an Environmental Bill of Rights. The tentative draft reads:

> It is hereby declared to be the policy of the State of California and a matter of statewide concern to develop and maintain a high quality environment in order to assure for the people of the state, now and in the future, clean air, pure water, freedom from excessive noise, and enjoyment of scenic, historic, natural and aesthetic values. The Legislature shall enact legislation to implement the provisions of this article, and notwithstanding any other provision of this Constitution, may make such legislation applicable to any state agency, to any charter or general law city, city and county, or county, and to any district or other local agency.[10]

A more detailed provision recently approved on a statewide ballot in Rhode Island stresses not only the conservation--"wise use"--of the natural resources of the state, but also lays emphasis on the maintenance of the natural environment. It is found in Article I, Section 17 of the Rhode Island Constitution:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore

> entitled under the charter and usages of this state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

Another proposed wording for an environmental bill of rights, which also specifically mentions preservation, is that of students at the Northwestern University Law School. It includes four main points: (1) an inalienable right to a clean environment; (2) a grant of power to the legislature to pass laws necessary to buy and preserve land in a wild state; (3) the power of redress for a citizen if his environment is adversely affected by the government or any other person, corporation, firm or association, and (4) the power of a citizen to challenge any governmental action in which the government could not show that its acts would not adversely affect the environment.[11]

The choice of words here may be important. To use a term such as "decent" may not offer the judiciary much guidance and, as pointed out by Hanks, may confront the court with a job it has properly refused to perform.[12] Wording of the sort which would be amenable to the admission of competent, technical testimony would be a "healthful environment." To orient the right toward some regard for the preservation of the natural attributes of the environment, the words "unsullied environment" would probably serve the purpose. Perhaps the strongest wording would be a combination of the two.

One commentator, Joseph Sax, has said that although the constitutional recognition of the right to a decent environment would betoken our good intentions and help to set before us a goal toward which our society ought to aspire," it would be

> naive to believe that any such declaration could be a substitute for the dreary task of dealing with the environmental problem that must be met and resolved daily in a thousand individual cases. In itself, a constitutional amendment would save not a single wetland or forest; it would remove no cement plants or

> automobile exhausts; and it would clean no streams. . . . An essential question that must be asked whenever proposals for an environmental declaration of rights are raised is whether those rights are going to be enforceable, and if so, by whom. The value of moral pressure should not be ignored; but its importance in enforcing those rights depends to a great extent on the context in which the declaration is made. Fifty years ago . . . a declaration of the right of the people to clean air and water might have represented a dramatic step forward. Today, however, one would have to search far and wide to find anyone unwilling to endorse the sentiments [of a typical constitutional right to an unspoiled environment].[13]

Sax concludes:

> [I]f the purpose of [declaration of the right to a decent environment] . . . were to encourage administrative agencies to adopt the view that they have environmental responsibilities, the declaration would come late in the game--that was yesterday's battle. . . . So long as an official thinks that he is thinking environmentally, a declaration is not likely to change things perceptibly.[14]

Most environmental writers have made similar points. That raises the most important question: If an environmental bill of rights is placed in the constitution, who will be able to enforce it, and against whom can it be enforced?

Enforcement of an Environmental Bill of Rights

Several alternatives exist concerning the enforcement of constitutional "environmental bill of rights" provisions. In the case of the California and Rhode Island provisions, the legislature provides the impetus for enforcement. In the case of the Illinois provisions, those of the New York Constitution and those proposed by students at Northwestern University law school, the legislature has certain enforcement obligations and citizens also are granted powers of enforcement. Another alternative is that implicit in provisions like those of the proposed Idaho Constitution or those currently incorporated in Article II, Section 7 of the Florida Constitution, where it is not entirely clear who can enforce them. What follows is a discussion of legislative enforcement of general environmental quality provisions and the possibility of supplemental citizen enforcement, particularly the access a citizen has to the judicial process

to seek orders compelling public agencies, private groups, individuals and corporations to observe environmental quality standards.

Enunciation of environmental quality safeguards is almost certainly an inherent part of legislative power. That is, no explicit constitutional delegation of authority in this area is necessary beyond the general delegation of law-making authority specified, for example, in Article V, Section 1 of the Montana Constitution unless such a delegation is intended to be mandatory. Several states have found such a mandatory delegation of environmental quality standard-setting authority to be advisable. Wording of this sort provides the legislature with an affirmative duty to protect the environment.[15] State legislatures across the country have performed this function with varying degrees of commitment and success by enacting statutes designed to moderate man's impact on the environment. For example, the Montana legislature has passed water and air pollution control, mine reclamation, and other statutes including an Environmental Policy Act [Revised Codes of Montana, 1947, Sec. 69-6503] which declares it state public policy

> in cooperation with the federal government and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony. . . .

The act also specifies ways such a policy can be implemented, stressing such things as recycling, individual responsibility and population balance.

The extent to which any legislature--meeting periodically--must rely on the executive branch of government also is reflected in the act. General directions and guidelines are laid down to further clarify the intent. This type of reliance on administrative agencies--due in part to the increasing complexity of society and the issues dealt with--was discussed briefly earlier in the essays on Separation of Powers and Safeguards in Administrative Procedure. Such a delegation of power--often formidable power--creates a persistent dilemma for decision-making in democratic government. On the one hand, a continuing effort of centralized management and planning is essential in order to cope with the day-to-day problems confronting state governments. On the other hand, "bureaucracies grow up to do the work and planning, and decisions touching the vital interests of the commonwealth are made in rooms insulated from the voice of the people."[16]

The tension created for any democratic society is that fundamental policies can be made by small professional groups, largely free from outside checks. Theoretically, at least, in a democratic republic the basic decisions are made in public by representatives chosen by the voting public. Administrative agencies are, schematically speaking, one step removed from that public; practically speaking, the connection between the agency and the citizen often is remote. The public concern over the magnitude and immediacy of the problem of preventing pollution and the destruction of natural resources also is reflected in the creation of administrative agencies whose principal duty is to protect the environment. Although the shape and potential of these agencies is not yet clear, at least one commentor has noted that "they often lack the resources to monitor all potential threats to the environment and to respond to them with speed and effectiveness."[17]

Another commentator has criticized the Montana Environmental Protection Act in this fashion:

> It is urged by this author that while the E.P.A. embodies a commendable statement of policy, the Act is entirely too discretionary. After making its studies, the Council merely recommends to another arm of government and then hopes that action will result. The people of Montana need more than recommendations; they need something which will compel compliance with the policy propounded by the E.P.A. Without any compulsory language, the "enjoyable harmony between man and his environment" is nothing more than a lofty ideal and the Environmental Quality Council would appear to exist merely to appease the environmentalists.[18]

If this kind of criticism is true of the agencies specifically created to handle environmental problems, it probably is safe to assume that other administrative agencies within the executive branch also will not have the resources or power to assure a general agency commitment to the enhancement of the natural environment. Such an incapacity has been widely noted.[19] In answer to this dilemma and the fear that administrative authority may be too discretionary, an increasingly accepted theory has called for some sort of citizens' right to compel the observation of environmental quality. In short, enforcement rights supplementary to the statute-making authority of the legislature and the standard-setting authority of administrative agencies are increasingly at issue. According to the Second Annual Report of the federal government's Council on Environmental Quality, "recent [state constitutional] proposals [on environmental protection] focus on the individual's right to

environmental protection and raise the possibility of increased resort to the courts to vindicate that right."[20]

Examples of this kind of activity can be found in several state constitutions, and statutes and in at least one federal environmental protection statute. The Federal Clean Air Act in Section 304 removes the grounds for denying individual citizens standing to sue for abuses of water quality and also abolishes the government's claim of sovereign immunity in this area[21] (see Chapter IX, on sovereign immunity). A similar approach is a part of the Michigan Environmental Protection Act of 1970. Legislation similar to the Michigan act was passed in May of 1971 in Connecticut. Citizen suit statutes also have been adopted in Indiana and Minnesota.[22] A new constitutional amendment in New York [Art. XIV, Sec. 4] announces a state policy "to conserve and protect its natural resources and scenic beauty." The state legislature is directed to carry out the policy. Section V of the same Article permits citizens to restrain any violations of the Article. Thus, a citizen can seek an injunction to halt possible transgressions of the state's public policy of environmental quality. The Illinois Constitution also grants individual environmental rights. Section 1 of Article XI declares a state public policy to maintain a healthful environment:

> The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.

Section 2 of the same Article deals specifically with the rights of individuals:

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

What these provisions have in common is their grant of standing to the individual to enforce through the judicial process certain obligations. Thus, the traditional grounds for denying that the citizen is the proper party to prosecute a suit not based on personal property damage is explicitly removed. This is not to say that there were never available legal theories which individuals could use in an effort to halt activities which damaged less tangible interests of the environmental quality sort.

A brief discussion of legal theories currently available for individual suits against alleged polluters is in order. It has been noted that it is the common law, which Warren and Brandeis said was in "eternal youth,"[23] that will in all probability continue to give much of the shape and direction to private environmental law suits for a number of years to come.[24]

In the main, there are three legal theories that are fairly well-developed and have had frequent application in pollution suits: negligence, trespass, and nuisance. The most ample of the three is negligence, dealing simply with alleged carelessness. A person sues, arguing that the defendant did not exercise sufficient care in certain activities and that the person being sued is therefore responsible for damages sustained. In this type of suit, the person suing bears the burden of proving that the polluter was careless; he must show that the acts of the polluter did not come up to the standard of care which a reasonable person would have followed. In addition, the injuries sustained must be shown to be the result of those actions for which proof of carelessness is established. Questions arise quickly from this doctrine; for, example, does "care" require that a polluter use the latest and most advanced pollution abatement devices? There seems to be a trend in this direction.[25]

Trespass is one of the oldest rights of action in the law. Liability for damages is created when there is entrance, personal or otherwise, onto the land of another. Although one need not prove any carelessness in this kind of action, the plaintiff must prove that the person being sued deliberately caused the entry. In pollution cases based on trespass allegations, the courts did not have much difficulty in dealing with visible pollutants; such was not the case for gases which were toxic or merely odorous, however. A concept of indirect trespass has further embellished this cause of action.[26]

Concerning the third type of action--nuisance--two leading attorneys in the field state:

> The law of nuisance is one that no lawyer in his right mind would want to discuss for his fellow lawyers let alone the layman. It has been called the most confusing of all the tort areas of the law and defies simplification.[27]

Despite the complexity of the nuisance action, it is the most commonly used theory for environmental legal actions. A general idea of what nuisance entails can be seen in the definition of nuisance as unreasonable interference with the interest a

person has in the enjoyment of property. An additional distinction between kinds of nuisances is those which involve private damage to personal property rights and those which involve private damage to the general public. In general, for a private person to sue for the abatement of a public nuisance, he must suffer more damage than the general public. This is the limitation on the applicability of this kind of suit to the abatement of pollution. Under such a theory, if all are damaged about equally, there is no cause of action. Although this type of action appears at first to be ideal for anti-pollution suits, it is only the person directly damaged who can sue in the case of a private nuisance; in the case of public nuisance, one must often prove damages of a different kind, not merely of a different degree, than those sustained by the public in general.[28] Thus, "it has been the conventional rule that the public's right to abate a nuisance may be enforced only by public authorities."[29]

It may seem somewhat of a let-down at the end of this brief discussion of current legal theories available for actions to cite an author who notes that: "Unfortunately, private litigation has hitherto been of limited effectiveness in the fight against pollution."[30] However, his criticism is not arbitrary and cannot be ignored. It is supported by other writers in the field, some of whom offer a more damning indictment.[31] Eva Hanks has gone so far as to say:

> The judge-made common law as a legal mechanism for the protection of the environment can be dismissed at the outset as trivial in its breadth and ineffective in its application. The historical common-law remedy for environmental degradation is the private nuisance (sometimes negligence or trespass) action. . . . The state of the environment testifies to the effectiveness of the remedy.[32]

This dissatisfaction with the applicability of the old common-law theories of negligence, nuisance and trespass to environmental problems, coupled with the insulation of standard-setting authority from legislative and public scrutiny, has led to the increasing attention to the area of citizen and public interest group standing to sue alleged polluters.

"In the current turmoil of environmental litigation, there are few areas so much in ferment as that known as standing," the Montana Law Review recently noted.[33] The Review continued:

> [T]he right of the citizen to challenge actions of the federal government in order to protect an environment has gained an established position . . . and . . . feasible means exist to provide standing

> to citizens to challenge action of other citizens on behalf of the public interest in the environment.[34]

But in general, the above trend notwithstanding, "in the federal, and most state courts, the individual citizen, and even groups of concerned citizens, have no standing to secure judicial review of actions threatening their public resources."[35] This situation is not the product of design but reflects the fact that the traditional legal remedy was one for personal damages. To be granted standing, one generally had to show personal injury to his tangible property. In recent court cases, injury generally no longer is confined to tangible property damage; it extends to aesthetic, conservation and recreational interests.[36] Standing in the United States was first extended to the taxpayer, permitting him to challenge municipal expenditures. Later it was also granted to a citizen to challenge state expenditures and, eventually, in 1968, was used to challenge federal expenditures.[37] In addition, the Supreme Court has long recognized that the "public interest" provides a basis for standing.[38]

These two considerations--the broadening of "interest" to include intangibles and basing standing on the public interest--taken together, are the source of the increasing access to the judicial process for environmental protection. Although the U.S. Supreme Court has not directly faced the problem of standing in litigation for the protection of the environment, it has offered two general standards in other areas. The two tests are that the plaintiff show an "injury in fact" and that the "interest sought to be protected is arguably within the zones of interests to be protected by the statute or constitutional guarantee in question."[39] With the thrust of statutory enactments being to protect the environment, increasing claims are made that these statutes create the kind of interest which permits citizen enforcement. And more and more, "it is clear that the public interest has gained a point of access to the administrative decision-making process" through citizen access to trigger the judicial enforcement mechanism.[40]

The advantages of allowing private citizens to initiate suit against public officials and agencies or private persons are claimed by proponents to be many. It is said, for example, that citizens who are aware of minor or local environmental threats can make public such a threat by resorting to the judicial process, whereas a distant administrative agency may not have the resources to detect or handle these smaller problems. Access to the judicial process also gives the citizen the power to force administrative agencies to fulfill their statutory duties. Such considerations were the basis

of a suit by a citizen's committee in New York's Hudson Valley in an effort to halt the construction of an expressway there.[41]

Another argument for citizen's suits is that a citizen could initiate a class action on behalf of the unorganized majority of citizens in order to protect their interests against a well-organized lobby of minority interests. Access to the courts in this case could help connect the voices of private individuals who ordinarily have the opportunity to speak on public questions only at elections.

Opposition to the citizen's right to sue--especially the extension of standing to permit suit of private groups and corporations--is based on two main considerations. It is argued that the courts will be flooded with all manner of suits--multiple suits, harassment suits and suits for monetary damages. It is held the court system is already overloaded and cannot bear the burden of numerous suits over environmental matters. Because the grants of standing to citizens are a fairly recent phenomenon in the environmental area, such an argument is difficult to assess. However, in Michigan, where standing was first granted, ten suits were logged in the four months following enactment. Of these ten four were filed by governmental agencies themselves.[42] On this point, one commentator has written:

> While an increase in cases can certainly be expected there is little danger of a flood of litigation when it is remembered that the courts here, as in all other areas of litigation, control the gates. They remain competent to screen the meritorious from the frivolous, the genuine from the vexatious. The law to be developed will be that applied to situations as they arise, in an area not presently conducive to codification because of the variables, the present uncertainties involved, and the overriding need for creative and innovative decisions. The courts are proving their competence in cases of judicial review to hear and decide a great variety of complex environmental issues, not because of their scientific and technical expertise, but because the disputes are of basic and fundamental policy matters, requiring the weighing and balancing of conflicting interests.[43]

Various judicial mechanisms, such as the requirement that one complaining establish a prima facie case, bonding requirements and court cost allocation, could operate to deter frivolous and harassing suits. Perhaps the greatest deterrent to harassment suit is the high cost of litigation. Environmental suit

costs quickly run to six figures.[44] The doctrines of res judicata and collateral estoppel also could operate to deter multiple suits on the same question.[45]

Damage suits--suits for monetary compensation--are not likely to occur under the standing principle. The purpose of a public suit of this type is to restore environmental quality or halt environmental abuse, not to claim personal damages. Private monetary remedies for monetary damages already exist in the common law, in any case.

The second major argument against extension of standing to the citizen is that resulting suits may dampen interest in industrial development in the state, that the potential of an environmental suit may keep industry from coming into the state by creating a climate unfavorable to development. Against this argument it is said that "environment protection is becoming a national concern, and no state is likely to remain without some restrictions on pollution and the use of natural resources."[46] In other words, all states are adopting various environmental restrictions to assure that industrial development does not have undue adverse effect on the environment. States still are found extending good will to those industries most successful in reducing environmental damage, to industries which "steer middle course between unthinking exploitation and unyielding preservation."[47]

In conclusion, the agitation for and against increased citizen rights in the area of environmental protection continues. Standing bills are under consideration at the federal level and at least nine states.[48] The Montana legislature itself considered four measures granting the citizen's right to sue in its 1971 session. Although none passed, the ongoing nature of the dispute is indicated in the remarks of the chief sponsor of one of the measures:

> Citizen concern for environmental protection is not a passing fad. Future legislatures will have the opportunity to again consider the wisdom and necessity for similar proposed legislation giving citizens the right to preserve and protect the world in which we all live.[49]

Regardless of the Convention action in this area then--whether or not the broad outlines of a citizen right to sue for environmental protection are written into the fundamental law--the legislature still would have work to do. If the Convention decides not to include such a right, the legislature in all probability will again consider the question in 1973. Even if the citizen's right to sue is written into the Constitution,

the legislature would have to fill in statutory requirements to supplement the constitutional broad outlines. For example, the Illinois provision authorizing individual suits directs the legislature to establish reasonable exemptions and regulations for such suits.

EMINENT DOMAIN

> I do not believe there is any proposition that will go into this Constitution that is of any more importance to the people of the proposed State of Montana than the proposition [on eminent domain] we are now considering and I do not believe that anything that has yet been suggested or offered will obviate the difficulty, the constitutional objection to taking this character of property for what will be determined to be in all probability a private use--J. K. Toole, 1889 Convention

Eminent domain is the power of the state to take private (or public) property for public use.[50] The Montana Constitution contains two provisions that outline this power. The first, Article III, Section 14, is the typical eminent domain provision: "Private property shall not be taken or destroyed for public use without just compensation having been first made to or paid into court for the owner." The second provision, Article III, Section 15, is an explicit extension of the definition of "public use:"

> The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

These two provisions have an interesting history. In addition, both are supplemented by a substantial body of statutory law. An in-depth discussion of the principle of eminent domain is beyond the scope of this report; a brief discussion of the constitutional history of eminent domain in the state and a discussion of the heightened concern over its environmental impact follow.

The 1884 Constitution contained provisions on eminent domain. Section 14 of Article III provided:

> That private property shall not be taken for private use, unless by consent of the owners, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes.

Section 15 provided:

> [P]rivate property shall not be taken or damaged for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law; and until the same shall be paid to the owner or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

The interesting part of this provision is the assertion that the judiciary can ascertain whether a given use is public, and in doing so, it can disregard any legislative enactment defining certain uses to be public. The Colorado Constitution from which most of the Montana Declaration of Rights came, still contains this provision in Article II, Section 15. The records of the 1889 Convention are not complete enough to enable one to ascertain the reasons for departing from this 1884 wording. The floor debates are, however, indicative.

As the provision on eminent domain first came before the whole Convention in 1889, it provided for just compensation for private property taken for private use with the consent of the owner. The exceptions for which private property could be taken without consent were "for private ways of necessity, and . . . reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, or sanitary purposes." Delegate Marshall of Missoula protested that this provision was the "height of despotism" and the debate was on.[51] Delegate Bickford argued that "it frequently becomes necessary in the Territory of Montana for private property to be taken for what is in fact a private use. . . ." Referring to "that old constitutional provision in the Constitution of the United States,"

which provided in traditional language that private property could not be taken for public use without just compensation, he urged the delegates to adopt the innovative principle that private property could be taken for certain private uses. Delegate Knowles then rose and, while admitting that the proposed private use provision was a "departure from the ancient land marks," charged that it was a similar departure for a Nevada court to have recently declared that it was a public use for a man to sink a mining shaft on another's land with a view to working the mine himself or permitting a corporation to do it.

Knowles wanted the provisions to be included in the Declaration of Rights as proposed, feeling they were necessary to the future of the territory.

Delegate Maginnis confused the issue somewhat by agreeing with Knowles and adding an amendment that would have placed the corporation on the same footing as persons in the face of eminent domain actions: "The right of eminent domain shall not be curtailed and the property of corporations shall stand upon the same principle as the right of persons." This type of provisions was later incorporated as Article XV, Section 9.[52]

Then Delegate Luce suggested that the Convention resolve the messy issue of private use by adding a section which would define certain uses to be public. He noted that "the courts have always denounced the idea of taking private property for private use, and always should, because if you open the door for one purpose, it may be opened for all purposes, and no man would be secure, in his property."[53] Luce believed this problem could be avoided if the Convention were to stipulate what would be the public uses for which private property could be taken. Luce mentioned two specific uses he had in mind; irrigation and mining.

Amid further wrangling, Delegate Toole of Lewis and Clark stated that this was probably the most important proposition to go into the Constitution. Noting "the difficulty, the constitutional objection to taking this character of property, for what will be determined to be, in all probability, a private use," he successfully moved to pass consideration on the whole matter.[54] At a later stage in the Convention proceedings, the eminent domain provisions were approved in their current form. In the finally accepted version, condemnation proceedings were made mandatory, and public use was defined to include necessary roads and irrigation works.[55]

A few things can be noted from the direction the debate took. In the first place, the delegates appear to have viewed eminent domain as the granting of a <u>right</u> to the state.[56] However, contrary to this, it has been noted that eminent domain is a

power of the state and not "merely some kind of a right reserved by the sovereign out of the sovereign original ownership of all lands." That is true even though there is no provision in the U.S. Constitution expressly granting the power to either the federal or state governments. The U.S. Supreme Court has held that the power of eminent domain is inherent in the concept of sovereignty and that it requires no constitutional recognition.[57]

In general, American and international scholars have agreed with the court in regarding eminent domain as a principal part of sovereignty.[58]

In addition, the Court has offered (for eminent domain) a rationale of the kind Alexander Hamilton expressly feared in the Federalist Papers. In an 1875 case, the Court said the eminent domain provision of the Fifth Amendment is an implied assertion of the power to take property with just compensation.[59] Hamilton had argued in Federalist No. 84 that there was a good chance that a federal bill of rights would lead to the expression of governmental powers not expressly granted in the Constitution. In an ironic way, his thesis has been actualized.

In any case, the power of eminent domain is expressly recognized in the Montana Constitution. Article XV, Section 9 provides:

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals. . . .

That there also are individual rights associated with eminent domain will be made clear below.

More important than the above was the disagreement among delegates as to whether the uses they were enumerating were really public or merely private. They resolved the issue by declaring certain of them to be public uses, such as irrigation, and, by later statute, mining and extraction of underground natural gas reservoirs, urban renewal projects, electric light and power lines, flood prevention projects by cities and towns, etc. That this solution did not really square the issue of public use raised during the 1889 Convention can be seen from the above debates.[60]

The delegates to this Constitutional Convention will have occasion to reconsider the question of whether eminent domain should be exercised in cases which some consider to be the appropriation

of private (or public) property for essentially private uses. In such case, the uses designated as public by statute also should be reviewed.[61]

In addition, there is considerable contemporary concern about the environmental impact of eminent domain actions. One commentator has noted in what is now a nearly universal judgment that "the portion of the nation's land 'still in nature' has steadily diminished." He goes on to enumerate some of the causes:

> Old cities have expanded, and new ones have been created. Vast networks of highways, utilized by millions of automobiles, wind their way across the country. Complex systems of utility lines and pipelines, which provide needed electricity, natural gas, oil, and communication crisscross America. These developments, however, have not been without costs.[62]

Charles Reich has written of the heightened public protests against the appropriation of lands without due regard for maintaining the quality of the environment. He argues that these protests are a sign of the increasing trend toward direct political action as an alternative to the regular processes of representative government.[63] A member of the American Bar Association Committee on Environmental Law has lamented that

> the world is "coming increasingly under the domination of a single ecumenopolis. It is a global city, leaving much of the land surface vacant but marking all open space as clearly subordinate to urban demand."

He concludes that land has become "a rural existence waiting to become an urban event."[64]

The central concern for these three commentators and a host of others is the appropriation of land without due regard for environmental exigencies. And one of the principal tools by which land is acquired for various uses is the power of eminent domain. Under ordinary circumstances, any land with particular environmental significance can be condemned. Several alternatives--all within the general principle of eminent domain--to the relatively easy taking of what may be environmentally significant lands suggest themselves.

One of these alternatives concerns the "prior public use doctrine." Ordinarily, any land already committed to a public use may not be condemned for another public use unless the

alternative use is superior. To do so without such showing requires express legislative authorization.[65] The problem is that much privately held land which may have some environmental significance does not, under current law, qualify as a "prior public use." To these landowners falls the difficult burden of proving that the condemnation of their land is either arbitrary or capricious. Even in the case of a non-profit corporation formed exclusively for the acquisition of land for conservation and preservation, this burden is not easily shaken. A possible remedy involves the extension of the prior public use doctrine to cover owners of environmentally significant land. The effect would be that if a landowner could prove that his land was in some sense environmentally significant, and that the taking of his land would result in significant environmental damage, his land would be covered by "the prior public use" doctrine and would not be subject to condemnation for another public use.[66]

Another alternative involves shifting the burden of proving that there is no adverse environmental effect to the condemnor in all eminent domain actions. In lieu of such proof, the condemnor could be required to prove that no feasible and prudent alternative to the taking of the property exists. This approach already has been incorporated in several federal laws and regulations that are designed to safeguard environmental quality. It also is in practice in federal air and water quality standards, in safety standards prescribed for drugs, in the exhaust-emission control requirements for automobiles and in an increasing number of other areas.[67]

The assistant general counsel to the National Science Foundation, Charles Maechling, comments on a more general application of this shifted burden of proof to the whole area of land use and new technologies:

> In the past, technological progress and resource development were regarded as so beneficial in themselves that a crushing burden rested on complaining or injured parties to obtain legal redress against their noxious or harmful side-effects. The probably pernicious consequences of a technical innovation as a proposed land use were ruled out as speculative, and extensive actual damage had to occur before there was even a remote chance for preventive action. Recently, however, both leaders of the scientific community and the Chairman of the House Subcommittee on Science, Research and Development have asserted the need for some sort of federal review system for new technology.

Maechling notes the National Academy of Science recommendation that it should be incumbent on the introducer of a new technological development or the proponent of a potentially damaging alteration of the landscape to demonstrate a low level of damage to the environment prior to such a development.[68] The point apparently is not to stop industrial growth, but to halt undue environmental degradation.

Another alternative is the approach used in the Michigan Environmental Protection Act of 1970.[69] Under this act, a plaintiff is empowered to halt the activity of any defendant, including one condemning land for eminent domain purposes, by offering evidence that adverse effect on the environment is likely. The law states:

> Any person . . . may maintain an action . . . for declaratory and equitable relief against the state, any political subdivision thereof . . . any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction.

A defendant in such an action may contest the issue of environmental damage or may demonstrate that there is no feasible alternative and that the activity is "consistent with the promotion of the public health, safety, and welfare in the light of the state's paramount concern for the protection of its natural resources. . . ."[70] In an action of this type, the burden of proof rests with the plaintiff. Although this type of declaratory action is of significance, the previously discussed reallocation of the burden of proof of environmental damage to a condemnor would amount to a presumption of environmental damage that would need to be rebutted prior to condemnation, whether or not someone took action. Thus, a condemnor would be compelled to view all condemnation activities in terms of their environmental impact.

Another theory of the protection of land against abuse has particular relevance in a consideration of eminent domain. In general, the rights associated with eminent domain are designed to insure that any property taken will be taken for a public purpose only with just compensation being made prior to the condemnor exercising jurisdiction over the property. That is, the rights surrounding eminent domain exist to guarantee private property rights against undue destruction or damage. This is in support of the notion that "the exercise of eminent domain is not without restraint."[71] On the other hand, the

power of eminent domain is designed to provide access, in the name of the elusive "public good," to land for strictly defined public uses. The power of eminent domain views the condemnation proceedings from the standpoint that land is required for some public purpose. What follows is a brief discussion of the public trust doctrine, how it views the condemnation proceedings in the main from the perspective of the power of eminent domain and how it provides interesting remedies by creating a public right.[72]

Article XVII, Section 1 of the Montana Constitution mentions the concept of a public trust:

> All lands of the state that have been or that may hereafter be granted to the state by congress, and all lands acquired by gift or devise, from any person or corporation, shall be public lands of the state and shall be held in trust for the people [emphasis added]. . . .

Article XV, Section 9 of the Montana Constitution states another form of the public trust doctrine.

> The right of eminent domain shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals, and the police powers of the state shall never be abridged, or so construed, as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state.

This provision, adopted in 1889, has not been the subject of amendment or a proposed change of wording. As interpreted by the Montana courts, it means that the "property rights of corporations are not more sacred or exclusive than those of private individuals."[73] More important is the statement that "the public welfare is . . . the particular base upon which must be laid the correct application" of eminent domain.[74] That is, one of the principal tools used by the state to insure the public use of land rests squarely on some conception of the public welfare. A more recent case makes the same point:

> It is so well-settled as to hardly need citations of authority that under the guise of police power the state and the municipal subdivisions thereof have not only the power, but the duty to do all things necessary to fully protect the public in

> matters of the preservation, among other things, of the health and well-being of the community [emphasis added].[75]

In this case, the Montana Supreme Court went on to cite American Jurisprudence, saying:

> The breadth and extent of the police power, covering the exigencies confronting the community, its adaptability, durability, inalienability, and the number of public purposes included in its scope make it a principal pillar of government. It has been stated that the police power in effect sums up the whole power of government, and that all other powers are only incidental and ancillary to the execution of the police power; it is that full final power involved in the administration of law as the means to the attainment of practical justice. Moreover, it has been said that the very existence of government depends on it, as well as the security of the social order, the life and health of the citizen, the enjoyment of private and social life, and the beneficial use of property. . . . [The Court cited the maxim, "salus populi est supreme lex" (the well-being or wholeness of the condition of the people is the supreme law)]. It has been said that this maxim is the foundation principle of all civil government and that for ages it has been a ruling principle of jurisprudence.[76]

Other state constitutions employ the public trust concept in various ways. The Constitution of Virginia [Art. XIII, Sec. 175] contains a very limited application to the natural oyster beds of the state. Although Washington does not specifically mention the public trust, it does contain a provision [Art. XV, Sec. 1] establishing harbor lines and providing that water beyond such lines shall be reserved forever for landing wharves, streets, and other conveniences of navigation. Both Alaska and Hawaii also have provisions which imply the public trust concept. Article VII, Section 1 of the Alaska Constitution provides: "It is the policy of the state to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Section 3 of the same article provides: "Wherever occurring in their natural state, fish, wildlife, and water are reserved to the people for common use." The Hawaii Constitution provides in Article X, Section 1: "The legislature shall promote conservation, development and utilization of agricultural resources, and fish, mineral, forests, water, land, game and other natural resources."

Another example of a constitutional statement of the trust doctrine is found in Article IX, Section 3 of the Wisconsin Constitution:

> The people of the state, in their right of sovereignty, are declared to possess the ultimate property, in and to all lands within the jurisdiction of the state; and all lands the title to which shall fall from a defect of heirs shall revert or escheat to the people.

The operation of the Wisconsin doctrine as reflected in its wording is quite different from that of the Montana provisions, and is suggestive of the potential of the trust doctrine as a theory of environmental protection. In an early Wisconsin case involving the trust doctrine, the state Supreme Court ruled that the final determination of whether an act is a "public purpose" is not a legislative matter, but must be made by the judiciary.[77]

That ruling suggests the above-mentioned wording of the eminent domain provisions in Montana's 1884 Constitution, whereby the judiciary was empowered to override a legislative decision that a use was public. That is, the judiciary could say that a use was not public regardless of any legislative declaration on the matter.

Other Wisconsin decisions dealing with the public trust concept announced that the state has an obligation not only to preserve but to promote the public trust.[78] More recently, the Massachusetts Supreme Court has handed down public trust decisions. In a 1966 case, a proposed private use of public lands was thrown out by the court for want of explicit legislative authorization.[79] Another case reaffirmed that an inconsistent use of lands in the public trust was barred unless the public will for the new use and the willingness to forgo the existing use was expressed by the legislature.[80]

Perhaps the most celebrated public trust case in the country was decided in 1890 by the U.S. Supreme Court. The case, Illinois Railroad Co. v. Illinois, resulted when the Illinois legislature tried to recover land it had granted to the Illinois railway. The grant included all the land underlying Lake Michigan, all land within a mile of the shoreline and the whole commercial waterfront of Chicago. The Supreme Court, in upholding the power of the legislature to invalidate the grant, said that the legislature had no power to give up any trust lands in the first place. This case stands as an important precedent because it articulated the ideas which have come to be regarded as central to the public trust doctrine. According to one commentator, the Court in essence ruled:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.[81]

Although this notion has not met with uniform approval, a brief exploration of the potential of such a doctrine--explicitly empowering the state to vigorously enforce the overall interests of the public in land management over all narrower interest claims--is in order.

"In essence, the Public Trust Doctrine makes the government the public guardian of those valuable natural resources which are not capable of self-regeneration and for which substitutes cannot be made by man."[82] Thus, the doctrine could be the tool for the increased and innovative environmental use of the power of eminent domain. In addition, as another commentator has written, the doctrine could embrace three aspects: a legal right for the general public; enforceability against government, and flexibility to permit application to contemporary environmental quality concerns. In this case, the doctrine could expand the citizen's rights with respect to the use of the land.[83]

The basis of the doctrine was stated by Secretary Holmes of President Theodore Roosevelt's National Conservation Commission:

> The resources which have required ages for their accumulation to the intrinsic value and quality of which human agency has not contributed, for which there are no substitutes, must serve the welfare of the nation. In the highest sense, therefore, they should be regarded as property held in trust for the use of the race rather than for a single generation and for the use of the nation, rather than for the benefit of a few individuals who may hold them by right of discovery or by purchase.[84]

The adoption of an extended public trust doctrine could firm up the government's duty of care and responsibility to the public in the use of all land in much the same way as a trustee is obligated to his beneficiary. The doctrine has a long history which may shed some light on its possible uses.

Evidence can be cited that as far back as Plato there was a recognition that man is the guardian of his environment. In general, however, such evidence is weak; and it is safer to say that the early Western philosophers had no special insights into

the relationship between man and his environment. By the time John Locke's theories were written in the seventeenth century, the accent was placed on the individual property right and the right to unlimited accumulation. Locke noted then that the "world seemed full" and that therefore the accumulations of one would not unduly affect another.[85] It is currently acknowledged that this "full world" no longer exists.

The application of the public trust doctrine in the Anglo-American law yielded the same result: from a concept of the inalienability of certain public lands, it was transformed into a device for the protection of private property. The doctrine germinated in a public right to the lands under navigable waters to which title was early held by the king. Gradually, however, as the courts were confronted with the claims of riparian owners, these rights were upheld to the detriment of any public right that could be invoked.[86]

In 1892, the U.S. Supreme Court distinguished between two types of land held by the government: land for sale and land held as trust land. The trust land was held to be inalienable--it could not be sold by the state. That is, the state could not divest itself of its authority to govern such land.[87] Various courts now have established standards which help determine circumstances under which a sale of public trust land is permissible. Perhaps the most important of these standards is that such a transfer must be necessary to promote the interests of the beneficiaries of the trust.[88]

An example of the effect of the public trust doctrine can be seen in the enunciation of a constitutionally protected right to clean air, water and wilderness preservation, among other things. An essential adjunct to such a declaration would be the capacity and obligation to invoke the authority of the state in its enforcement. That is, the state, having dominion over the air, water and other resources, also would need a clear set of obligations in defense of that trust and in the face of its possible exploitation.

The operation of the public trust doctrine would affect not only governmental property but also private property being used in a manner inconsistent with the public interest or where such use was contemplated. In the case where the government attempts to use its property in a manner inconsistent with the public interest, the beneficiaries of the trust, having first exhausted any existing administrative remedies, could seek a writ of mandamus or some other form of relief. Such relief would be granted with a view to promoting the public interest in the land and would require regulation of such land and limitations on its use consistent

with that public interest. More important--and more difficult--is the possible application of the public trust doctrine to private property. As noted, the prior public use doctrine could be extended to protect land which could be proven to be environmentally significant. That is, private land use in the public interest could preclude future condemnation for such projects as highways construction, the erection of utility poles, etc. The problem occurs when private land is used in a manner unduly abusive of the environment.

In this instance, the conflict between private property interests and the public trusts could be harsh. Under the public trust principle, all property is ultimately within the trust and any transfer of it includes the obligation to use the land consistent with the standards of the trust. In other words, the trust principle stresses that there are conditions to the possession of land--basically that the land not be used for a purpose inconsistent with the public interest in a quality environment. An example of legislation already enacted shows how this principle can be applied. Air and water pollution legislation at the state and federal levels basically mandates that the air and water be used only in certain ways. When a person or corporation violates whatever standards are enacted, he is compelled to stop his abuse. The public trust principle could apply this reasoning to the land and, more broadly, to the environment as a whole.

Summing up the problem when the state is confronted with a private use of land in a manner detrimental to the environment, William Garton writes:

> The courts must be ever vigilant to protect personal liberties and property rights from arbitrary legislation. But . . . [t]o say that those whose activities so imperil society are entitled to compensation when denied the "right" to continue those activities is plainly to deny the historical, and essential, role of the police power.[89]

An article in a recent Montana Law Review recommended a constitutional public trust provision applicable to air, water and public lands:

> (1) Each person has a right to a healthful environment and each person has a responsibility to contribute to the preservation and enhancement of the environment.

> (2) The use of the air, water and public lands shall be a privilege granted only in the public interest and with regulations imposed by authorized agencies.
>
> (3) It is the policy of the state of Montana to hold in trust for the people to conserve the air, water, public lands and other natural resources by purchase, by withdrawal from use or by regulation; to provide, or to assist the counties and municipalities in providing facilities for recreation; to establish and maintain parks, forests, wilderness areas and prairies; to improve streams and other waters; to insure the purity of the air and water; to control the erosion of soils; and to do all else necessary for the protection of the natural heritage.
>
> (4) The attorney general, any political subdivision of the state, any agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the district court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

It should be noted that this proposal does not specifically incorporate wildlife, nor does it deal with the possible application of the doctrine to the use of private property.[90] A recent Montana Fish and Game Department letter advises: "Consideration should be given to a provision designating the fish and wildlife resources of the state as being a public trust to be managed in the best interests of the people."[91] This is in recognition of the fact that wildlife protection is a state function. The federal government, in general, protects only migratory and endangered species. Perhaps some version of the public trust doctrine whereby government was empowered to act on behalf of environmental considerations for all lands within its jurisdiction would offer an effective tool for responsible action in the preservation of the environment. It might be wise, as one commentator has written, to make government the "guardian of those valuable

natural resources which are not capable of self-regeneration and for which substitutes cannot be made by man" and, at the same time, to name the public as the sole beneficiary of such guardianship.[92]

The basic principle--sic utere tuo ut alienum non laedas--that one should use his property only in ways which do not injure another has long been recognized. In addition, it should be remembered that the Latin word for property (proprietas) never meant only what one could acquire. The term also contained the notion that one properly possessed property, that there was something appropriate about one's acquisition and use of property taken as it is from a common, finite store. It was not until the seventeenth century theories of John Locke that property lost most of its connotations of the ultimate requirement of propriety in all acquisition and possession.

The question appears to be whether the government should have the explicit duty of enforcing the public good of having all land used in a manner conducive to environment quality. Both the power and the right of eminent domain have the potential to assure that environmental considerations will be at the forefront of any proposal for the development of land or use of other natural resources. Indeed, one might even say that the theory of eminent domain--for so long allegedly used to the detriment of the environment--could become, if expanded and coupled with some combination of the above theories, the most pervasive source of legal protection of the environment while at the same time assuring that in no case should an owner be deprived of property without just compensation.

CONCLUSION

One observer of the ecological crisis has written:

> Whenever a new crisis or challenge emerges in American society, both leaders and citizens are quick to create a popular wisdom which simply, easily, and safely explains its origins and nature. Simple explanations are more readily understood, and they call only for easy responses. Easy responses entail minimal commitment in terms of time, money, and changes necessary to respond to the challenge. Safe answers and solutions ensure that prevailing special interests and social structures, which in reality may have contributed to the crisis, will not be threatened or altered. Such a process of rationalization is now developing with regard to the ecological crisis, and it may make it

> increasingly impossible for us to respond adequately to the root dimensions of the problem.[93]

A highly regarded political theorist makes a similar point when he states: "it is no longer a certainty that we will be able to solve our social ills by working with the same operational values and within the same systematic structures that have helped to create them."[94] Even if one does not agree with those statements, the points raised are ones which should be considered; there are no quick or easy answers to the depth of the environmental degradation to which all contribute, admittedly in varying measures. Indeed, as another author warns: "A century after the word 'ecology' was coined its subject matter has suddenly become fashionable. Sudden popularity is always dangerous. Ecology now runs the risk of being suffocated by its friends [emphasis added]. . . ."[95] Such criticism cannot be taken lightly.

That there is continuing degradation of the environment is scarcely debated. The solutions proposed for the problem are highly debatable, intensely political issues affecting all manner of private interests--consumer as well as corporate--in an effort to recast the mold of that elusive but crucial "public interest." And, in a society whose offspring allegedly have fifty times the negative impact on the environment as a child born in India, the solutions, even stopgaps, cannot be easy.[96]

NOTES

1. Charles Maechling, "The Emergent Right to a Decent Environment," Human Rights, American Bar Association 1 (1) August, 1970): 59. Cited hereafter as Maechling, "Decent Environment." For the same point, see T.Y.P., Jr., "Toward a Constitutionally Protected Environment," Virginia Law Review 56 (1970): 458, and Earl Finbar Murphy, "The Necessity to Change Man's Traditional View of Nature," Nebraska Law Review 48 (1969): 299.

2. See, for example, Dorothy Lee, Freedom and Culture (New York: Prentice-Hall, Inc., 1959), and John G. Niehardt, Black Elk Speaks (Lincoln: University of Nebraska Press, 1961). See also speech of Chief Seattle, January 9, 1855.

3. Albert L. Sturm, "Trends in State Constitution-Making 1966-1970," Prepared for publication in William and Mary Law Review 13 (1971): 21, in prepared copy.

4. Eva H. Hanks and John L. Hanks, "The Right to a Habitable Environment," The Rights of Americans: What They Are--What They Should Be, ed. Norman Dorsen (New York: Random House, 1971), pp. 146-147. Cited hereafter as Hanks, "Habitable Environment."

5. Ibid., p. 149.

6. E. F. Roberts, "The Right to A Decent Environment: Progress Along A Constitutional Avenue," Law and the Environment ed. Malcolm Baldwin (New York: Walker and Co., 1970), p. 147.

7. Hanks, "Habitable Environment," p. 153.

8. Griswold v. Connecticut, 381 U.S. 479, 493 (Goldberg, J.,) (concurring opinion).

9. Earl Finbar Murphy, "Has Nature Any Right to Life?" Hastings Law Journal 22 (1971): 483. Cited hereafter as Murphy, "Nature."

10. California, Assembly Select Committee on Environmental Quality, "Environmental Bill of Rights: (March, 1970), pp. 7, 20, 47.

11. Norman J. Landuau and Paul D. Rheingold, The Environmental Law Handbook (New York: Ballantine, 1971), pp. 38-39. Cited hereafter as Landau, Environmental Law.

12. Hanks, "Habitable Environment," p. 158.

13. Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action (New York: Alfred A. Knopf, 1971), pp. 234-235.

14. Ibid. pp. 263-237.

15. See, for example, New York Const. Art. XIV; Illinois Const. Art. XI, Sec. 1.

16. Charles Reich, Bureaucracy and the Forests (Santa Barbara: Fund for the Republic, 1962), pp. 1-2.

17. David F. Click and Peter H. Sullivan, Environmental Protection Act (New Haven: Yale Legislative Services, 1971), p. 2. Cited hereafter as Click, EPA.

18. Bill Leaphart, "'Public Trust' as a Constitutional Provision in Montana," Montana Law Review 33 (1972): 182. Cited hereafter as Leaphart, "Public Trust."

19. Click, EPA, note 4 at p. 3.

20. U.S., Council on Environmental Quality, Environmental Quality (Washington, D.C.: U.S. Government Printing Office, 1971), p. 170. Cited hereafter as CEQ, Environmental Quality.

21. 42 U.S.C. Sec. 1857L-2.

22. CEQ, Environmental Quality, p. 172.

23. Samuel Warren and Louis Brandeis, "The Right to Be Let Alone," Harvard Law Review 4 (1890): 194.

24. Landau, Environmental Law, p. 27.

25. See, for example, The City of El Paso v. American Smelting and Refining Co., et al., cited from Ibid., p. 267.

26. On trespass as a legal cause of action, see Reynolds Metal Co. v. Martin, 337 F.2d 780 (9th Cir. 1964) and Renken v. Harvey Aluminum, Inc., 226F. Supp. 169 (D. Ore. 1963).

27. Landau, Environmental Law, p. 30.

28. Ibid., pp. 30-31.

29. Louis L. Jaffe, "Standing to Sue in Conservation Suits," Law and the Environment ed. Malcolm Baldwin (New York, Walker and Co., 1970) p. 122.

30. Bernard S. Cohen, "The Constitution, the Public Trust Doctrine, and the Environment," Utah Law Review (June, 1970): 388. Cited hereafter as Cohen, "Public Trust."

31. See, eg., N. William Hines, "Nor Any Drop to Drink: Public Regulation of Water Quality. Part I, State Pollution Control Programs," Iowa Law Review 52 (1966): 196-201. This is the general point of Frank P. Grad and Laurie R. Rockett, "Environmental Litigation--Where the Action Is?" Natural Resources Journal 10 (October, 1970): 742-762.

32. Hanks, "Habitable Environment," p. 147.

33. Richard McCann, "Standing: Who Speaks for the Environment?" Montana Law Review 32 (1971): 130. Cited hereafter as McCann, "Standing."

34. Ibid. For the trend in the cases of challenges to government action, see note 5, p. 130 in Ibid.

35. Click, EPA, p. 8.

36. McCann, "Standing" note 11 at p. 131.

37. Flast v. Cohen, 372 U.S. 83 (1968).

38. See Associated Industries of New York v. Ickes, 134 F.2d 694, 704 vacated as moot 320 U.S. 707 (1943) and Office of Communication of the Church of Christ v. F.C.C., 359 F.2d 994, 1002 (D.C. Cir. 1966).

39. See ADP v. Camp, 397 U.S. 150, 153 (1970).

40. McCann, "Standing," p. 144.

41. Citizens Committee for the Hudson Valley and Sierra Club v. Volpe, et al., 302 F. Supp. 1083 (S.D.N.Y. 1969) aff'd 425 F.2d 97 (2d. Cir. 1970).

42. Click, EPA, p. 20.

43. McCann, "Standing," p. 143.

44. Robert Lohrmann, "The Environmental Lawsuit," Wayne Law Review 16 (September, 1970): 1129-30. Cited hereafter as Lohrmann, "Lawsuit."

45. Res Judicata is the doctrine that the matter in question has already been decided in a previous case. Literally translated, it means "the thing having been decided." Collateral estoppel, briefly stated, precludes raising a question or issue at a late stage in a proceeding unless such question was raised early in the proceedings.

46. Click, EPA, p. 21.

47. Joseph Sax, "Explanatory Memorandum" accompanying the Natural Resource Conservation and Environmental Protection Act 7, distributed by the West Michigan Environmental Action Council, Grand Rapids, 1969. Cited from Lohrmann, "Lawsuit," note 248 at p. 1129.

48. Click, EPA, p. 22.

49. Jeffrey J. Scott, "The Montana Environmental Protection Act: Where Do We Go From Here?" Montana Business Quarterly (Summer, 1971): 38.

50. Montana, University of Montana, School of Law, Eminent Domain, Research Report Prepared for the Montana State Highway Commission (Missoula, 1967), p. 32, citing Black's Law Dictionary (4th Revised ed., 1968), p. 616.

51. Montana, Constitutional Convention of 1889, Proceedings and Debates of the Constitutional Convention (Helena: State Publishing Co., 1921), pp. 120-124.

52. Ibid., p. 701.

53. Ibid., p. 123.

54. Ibid., p. 124.

55. Ibid., pp. 253-254.

56. Ibid., pp. 253-254.

57. See Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

58. Terry Calvani, "Eminent Domain and the Environment," Cornell Law Review 56 (1971): note 8 at 652-653. Cited hereafter as Calvani, "Eminent Domain."

59. Kohl v. U.S., 91 U.S. 367, 372-373 (1875). For Hamilton's fear, see Clinton Rossiter, ed., The Federalist Papers (New York: New American Library, 1961), 84.

60. Revised Codes of Montana, 1947, Sec. 93-9902 (9934) contains the statutory extensions of public use.

61. Ibid.

62. Calvani, "Eminent Domain," p. 651.

63. Charles Reich, "The Law of the Planned Society," Yale Law Journal 75 (July 1966): 1227.

64. Murphy, "Nature," pp. 457, 471.

65. See Calvani, "Eminent Domain," note 17 at p. 655.

66. Ibid., p. 656.

67. See, e.g., Federal Aid-Highway Act, 23 U.S.C. Sec. 138 (Supp. V, 1970); Department of Transportation Act, 49 U.S.C. Sec. 1653(f) (Supp. V, 1970); also see, H. R. 19732, 91st Cong. 2d Sess. (1970). Section 101 (d) (2) of the bill would forbid the Secretary of the Army approving any public works application unless, among other things, "either no adverse environmental effect is likely to result from such project, or there exists no feasible and prudent alternative to such effect and all reasonable steps have been taken to minimize such effect." H.R. Res. No. 1083, 91st Cong., 2d Sess. 21 (1970) recommends that the Secretary of the Interior require all right of way applicants to prove affirmatively that the proposed right of way is in the public interest and that, if there is to be harm to the environment, there is no feasible and prudent alternative. Cited in Calvani Ibid., note 23 at p. 657.

68. Maechling, "Decent Environment," p. 71.

69. Michigan Statutes Annotated, Sec. 14.528 (201)-(207) (Current Material 1970).

70. Ibid.

71. Calvani, "Eminent Domain," p. 653.

72. The latest Montana Law Review contains an article on the public trust doctrine which recommends its adoption at the state constitutional level to protect air, water, public lands and other natural resources. The article does not deal with the application of the public trust to private lands. See Leaphart, "Public Trust."

73. Butte, Anaconda and Pacific Railway Company v. The Montana Union Railway Company, et al., 16 Mont. 504, 521, 41 P. 232 (1895).

74. Ibid., at p. 537.

75. Ruona v. City of Billings, 136 Mont. 554, 557, 323 P.2d 29 (1959).

76. Ibid., pp. 557-558, citing Am. Jur., Sec. 245, pp. 966,

77. Priewe v. Wisconsin State Land and Improvement Company, 93 Wis. 534, 67 NW 918 (1896).

78. Milwaukee v. State, 193 Wis. 423, 214 N.W. 820, 830 (1927). See also, Muench v. Public Service Commission, 261 Wis. 492, 53 N.W. 2d 514 (1952) and State of Wisconsin v. Public Service Commission, 275 Wis. 112, 81 N.W. 2d 71 (1957).

79. Gould v. Greylock Reservation Commission, 350 Mass. 410, 215 N.E. 2d 114, 121 (1966).

80. Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E.2d. 577, 580 (1969).

81. Sax, "The Public Trust Doctrine in National Resource Law: Effective Judicial Intervention," Michigan Law Review 68 (January 1970): 490. Cited hereafter as Sax "Resource Law".

82. Cohen, "Public Trust," p. 388.

83. Sax, "Resource Law," p. 474.

84. U.S., National Conservation Commission, Report of the National Conservation Commission, Senate Document No. 676, 60th Cong. 2nd Sess. 109 (1909).

85. Plato, Laws, Book 5, p. 736, and John Locke, Concerning the True Original Extent and End of Civil Government in 35 Great Books of the Western World, 32 (1952). Both cited from Cohen, "Public Trust," p. 389.

86. Cohen, "Public Trust," pp. 387-388.

87. Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892).

88. In re Crawford County Levee and Drainage District, 182 Wis. 404, 196 N.W. 874, cert. denied, 264 U.S. 598 (1924).

89. William A. Garton, "Ecology and the Police Power," South Dakota Law Review 16 (Spring, 1971): 290.

90. Leaphart, "Public Trust," pp. 183-184.

91. Letter from Frank H. Dunkle, State Fish and Game Director, to Montana Constitutional Convention Commission, December 2, 1971.

92. Cohen, "Public Trust," p. 388.

93. Ritchie P. Lowry, "Toward a Radical View of the Ecological Crisis," Environmental Affairs 1 (June, 1971): 350.

94. Michael Parenti, "The Possibilities for Political Change," Politics and Society 1 (1970): 88.

95. Garret Hardin, "Foreword," in Mark Terry, Teaching for Survival (New York: Ballantine Books, 1971), p. x.

96. See, e.g., Dr. Paul Ehrlich, The Population Bomb (New York: Ballantine Books, 1969). This and a considerable amount of contemporary literature speaks to this point.

CHAPTER IX

MISCELLANEOUS PROVISIONS

UNENUMERATED RIGHTS

One of the central features of the system of rights reflected in the Bill of Rights and state constitutions is the notion that it is impossible to compile a complete and definitive list of the personal rights to which each citizen is entitled.[1] The Ninth Amendment to the United States Constitution and Article III, Section 30 of the Montana Constitution both reflect this idea in what is at first glance a baffling provision: "The enumeration in the Constitution, of certain rights, shall not be construed to deny, impair or disparage others retained by the people." It is baffling because there seems to be no readily acceptable answer to the question, "what other rights are there?" However, in no constitution, state or federal, is there any indication that the impressive list of rights contained therein is an exhaustive one. The federal unenumerated rights provision (the Ninth Amendment) was passed, along with the eight amendments which constitute the main body of the Bill of Rights, by the First United States Congress with no debate and almost no change in language from the Madison proposals.

Many had expressed fear that an effort to specifically enumerate a list of rights could never successfully include all rights, and that rights not mentioned might thereby be denied. Indeed, Alexander Hamilton, who opposed an explicit Bill of Rights at the federal level, had reason other than his belief that the federal government had no power to intrude upon fundamental personal rights. He also stated:

> I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.[2]

The unenumerated rights clause was adopted specifically to allay such suspicions.

In 1873, the United States Supreme Court noted the inexhaustive character of the guarantees explicit in the Constitution and said that the application of the broad guarantees must be a "gradual process of judicial inclusion and exclusion."[3]

However, the heart of the matter lies somewhat deeper. The extension and interpretation of the rights of men in political bodies is not only the function of the judicial branch. Whatever structure the legislature takes, from town meeting to representative body, it and the executive branch both play a role in the climate of liberty. More important, the public (ordinarily a small and often vocal minority of the public) has traditionally been the distinctive element in the development of attitudes shaping these distilled and written guarantees.

In the judicial realm, the unenumerated rights clause operates against the notion that the expression of one right effects the exclusion of others (inclusio unius est exclusio alterius) and thereby permits the courts to seek to give expression to new rights that emerge in the process of litigation. One example of this is the so-called Penumbra Doctrine of Griswold v. Connecticut.[4]

That opinion, written by Justice Douglas, stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[5] Justice Goldberg, joined by Chief Justice Warren and Associate Justice Brennan, approached this point more closely when he stated:

> I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court. . . and by the language and history of the Ninth Amendment. . . . I add these remarks to emphasize the relevance of that amendment to the Court's holding.[6]

Thus the Ninth Amendment is clearly construed to permit the judiciary to announce aspects of the concept of liberty that are not explicit in the Bill of Rights.

Although Justice Goldberg noted that the United States Supreme Court had ruled on the unenumerated rights provision in only a handful of cases, there are increasing signs that the Ninth Amendment could develop into the most important source of judicial activity of the contemporary period.

Conceivably, should state courts revitalize their approach to the area of personal liberties, the unenumerated rights provision could add to the previously discussed task of the states as experimenters in the field of new rights.[7]

The doctrine of unenumerated rights also has broader political implications: Especially when coupled with the Tenth Amendment reservation of powers "to the states . . . or to the people" it is an acknowledgment that the legal process and the rule of law do not operate as an all-inclusive blanket to define the limits of the political realm. And it is this area of political activity beyond established institution that is one of the requisites of the open society.

SOVEREIGN IMMUNITY

In recent years there has been considerable constitutional and statutory concern in the area of sovereign immunity. In his study of recent trends in state constitution-making, Albert Sturm has noted that "among the new or emerging substantive provisions adopted in the last five years" is "the authority to sue the government for injuries and damages (7 states). . . ."[8] For example, the Committee on the Bill of Rights in the recent Illinois Constitutional Convention recommended that wording doing away with sovereign immunity be attached to the ex post facto law provision. The 1870 Illinois Constitution [Art. IV, Sec. 26] had provided that "the State of Illinois shall never be made defendant in any court of law or equity," thus granting sovereign immunity to the state.

The convention committee recommended a provision stating: "The state shall have no special immunity from suit."[9] In support of its proposal, the committee stated:

> [B]y abolishing sovereign immunity in the State of Illinois, this sentence intends to assure that the State, all instrumentalities of the State, and all local government bodies will be subject to suit in the same manner as individual persons.[10]

The new Illinois Constitution suggests that the committee did not score a complete victory. The document states [Art. XIII, Sec. 4]: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

The Montana Constitution neither specifically allows nor prohibits sovereign immunity. But Montana court cases abide by the principle that "a state, by reason of its sovereign immunity, is immune from suit and it cannot be sued without its consent in its own courts, the courts of a sister state, or elsewhere."[11] This principle is held to exist separate from express constitutional sanction and rests on "public policy." It may be waived by a proper authority of the state in the absence of a conflicting constitutional provision.[12] In addition to the above, the state's consent to be sued is not a contract and can be revoked at any time at the discretion of the state. Should the state, for example, decide to forbid appeal of a decision favorable to it, it can revoke its consent and the appellate court must dismiss the appeal, leaving the lower court judgment stand.[13]

That is not to say that the doctrine of sovereign immunity is a hard and fast rule. For example, courts have attempted a distinction between "governmental" and "proprietary" functions. Governmental functions have been defined as those "vested for the administration of the general laws of the state;" alternatively, a function has been defined as governmental if it "benefits society as a whole and can not be done by other segments of society.[14]

On the other hand, proprietary functions are held to be those "carried out in a corporate or private capacity." Once this not entirely workable distinction is made, courts generally hold that the state is immune from suit when pursuing a "governmental" function.[15]

Other exceptions to the doctrine include personal suits for illegal or unauthorized acts and suits to compel a public official to legally perform his duty. But because both are not as clear as they seem, the burden of proof resting on the person bringing the suit is difficult to surmount.

Under current practice, then, sovereign immunity covers most suits in which "judgment for plaintiff will operate to control the action of the state or subject it to liability."[16] It has been noted that "nationally, the doctrine is waning rapidly." It has existed as a viable, if irrational, expression of the phrase, "a king who could do no wrong."[17]

Another commentator backs up this statement, writing that the continued adherence to the doctrine among the states is "due to its acceptance (albeit without rational justification) by the original states . . . ."[18]

The doctrine of sovereign immunity had its origins in the Roman law shortly after the Caesarian period. It was understood then that fault was based on an act of will. Since the state was viewed as not having a "will," there could be no fault and only the person committing the act could be sued.[19] In western political thought, the doctrine was an outgrowth of the notion that the "king can do no wrong." Since that time, the divine right of kings has been thoroughly debunked; however, the doctrine that the sovereign cannot be sued has a traceable history through the common law to its current use in the American system of government.[20]

The doctrine of sovereign immunity was first announced in American law in an 1812 case which relied on a 1788 English precedent.[21] Chief Justice Marshall announced the principle at the Supreme Court level in a dictum in 1821. He said: "[T]he general proposition that a sovereign state is not sueable, except by its own consent, . . . will not be controverted."[22]

Since that time the doctrine has been reaffirmed by federal courts and by courts in every state. The Montana Supreme Court reaffirmed the doctrine in a unanimous opinion November 4, 1971.[23] In upholding the doctrine, the court noted that the 1959 Legislature had provided a tort remedy against the state in certain circumstances. The court referred to Sections 83-701 to 83-707 of the Revised Codes of Montana, 1947, limiting the liability of the state to the amount of liability insurance state agencies carry. Section 83-701 provides:

> [T]he district courts of the state of Montana shall have exclusive jurisdiction to hear, determine, and render judgment to the extent of the insurance coverage carried by the state of Montana on any claim against the state for money only. . . on account of damage to or loss of property, or on account of personal injuries or death caused by the negligence or wrongful act or omission of any employee of the state of Montana, while acting within the scope of his office or employment, under circumstances where the state of Montana, if a private person, would be liable to the claimant for such damage, loss, injury or death, in accordance with the law of the State of Montana [emphasis added].

That statute also hints at the distinction between governmental and proprietary functions. Section 83-706 provides that the "state of Montana shall be immune under this act from any claim or demand, including judgments, in excess of such collectible insurance."

Appellants in this case sought to have the court overrule the doctrine of sovereign immunity as outmoded and bad public policy. Contending that the court had promulgated the doctrine and therefore could abolish it, appellants cited cases where state courts abolished sovereign immunity.[24] This occurred in Arizona, California and Idaho.[25]

The Montana Supreme Court, in refusing to overturn the doctrine, disagreed with the contention that the legislature had not acted in this area and that therefore the court could overrule it. Pointing to the 1959 law, the court said: "The legislature has spoken and we are bound by its enactments." The court, then, did not feel obliged to discuss the justifications for the doctrine of sovereign immunity.

As noted previously, it appears that current widespread acceptance accorded the doctrine by American states is based on the fact that the original states gave it their approval; new states' courts relied on the general acceptance elsewhere to justify their own acceptance of the rule.

A number of justifications have been offered in defense of the doctrine. For example, Justice Holmes said:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.[26]

Holmes' point has not gone unnoticed; it has been criticized as begging the question and being outmoded and conceptually dogmatic.[27]

Another argument cited in favor of the doctrine is that is prevents the state from being delayed in the expeditious performance of its functions and from having its control over government property and funds reduced.[28] But one who argues with this notion dismisses it by pointing to the magnitude of legal and monetary resources available to the state.[29]

Other arguments hold that a government tort is one committed by the whole people and its recognition is therefore absurd,

that governmental employees who commit allegedly wrongful acts are outside the scope of their authority and therefore are not covered by any sovereign immunity cloak, and, finally, that government ought not be subjected to the embarrassment of a liability suit.[30]

These contentions generally are dismissed as invalid arguments upon which no court would base a decision.[31] William Tanner also points out the fallacy in the argument that in suing the government for tort liability the citizen is actually suing himself. He states:

> [T]he people are not the government; rather they are represented by the government. . . . To bar a tort suit because of citizen interest and participation in government is analogous to barring a stockholder's tort suit against a large corporation. Furthermore, even if one views the government as interchangeable with the people, the balancing process demands that the theory be subordinated when tort claims arise.[32]

Perhaps the most important reason for the retention of the doctrine of sovereign immunity is financial, in spite of the fact that many commentators have pointed out the disparity between the resources available to the government and those available to the individual. One commentator, discussing the colonial acceptance of the doctrine, has stated that "the financial instability of the infant American states rather than . . . the stability of the doctrine's theoretical foundations" is the chief reason for its retention (emphasis added).[33]

Much writing in recent years has called for abolition of the doctrine of sovereign immunity. Various commentators, noting that the principle is rooted more in precedent than in logic or experience, argue that the fear of huge tort runs on the state treasury are exaggerated and that "the ready availability of liability insurance provides adequate protection at moderate cost which may be budgeted in advance."[34]

Other frequently offered arguments for abolition are that the government should administer justice against itself and in favor of its citizens as readily as it does between private litigants and that, as the government is required to pay for private property taken for various uses, so too should it pay when its policies and activities cause injuries.[35]

William Tanner concludes that the doctrine "has in its present form outlived its usefulness" and that it contributes to citizen

impotence in the face of governmental action; but, he also admits the difficulty attending the abolition of sovereign immunity: "What should take its place is more difficult to determine."[36]

He concludes (in a state that does not have an immediate constitutional convention prospect) that the Kansas legislature should act to modify the doctrine. Constitutional alternatives include the Illinois Constitutional Convention committee proposal (stating simply that the state shall have no sovereign immunity from suit) and the actual language finally adopted by the Illinois Convention (that sovereign immunity is abolished, except as the legislature may provide by law). That open-end system, whereby government is liable except where the legislature has acted, and the closed-end system, under which the government is liable only when expressly provided by statute, would leave the future extent of sovereign immunity up to the legislature. Especially in the case of the closed-end system, the provision would have no effect at all without legislative action. The question, to paraphrase Tanner, is, "Would the legislature respond in a manner favorable to the convention intention?"[37]

IMPRISONMENT FOR DEBT

The Montana Declaration of Rights contains a provision generally prohibiting imprisonment for debt. Article III, Section 12 reads:

> No person shall be imprisoned for debt except in the manner prescribed by law, upon refusal to deliver up his estate for the benefit of his creditors, or in cases of tort, where there is strong presumption of fraud.

This provision permits more extensive debt imprisonment than the typical wording in other states, which simply prohibits imprisonment for debt. Although the Montana provision does not prohibit imprisonment for a militia fine in times of peace as do provisions of several other states,[38] it does require that the debtor deliver up his estate before he can claim the protection; it also permits debt imprisonment in tort cases (civil or priate wrong) where there is strong presumption of fraud. A few other states require the same.[39]

In general, however, constitutional prohibitions against imprisonment for debt do not extend to tort actions and cover only actions arising out of contract, expressed or implied.[40]

MISCELLANEOUS PROVISIONS

During the first Hawaii Constitutional Convention, delegates discussed a provision to exempt some reasonable amount of a person's property from seizure or sale for the payment of debts.[41] Such a provision would have the effect of limiting a person's liability to a point where he still could maintain his existence. Such provisions call to mind the protection extended to individuals who incorporate under the laws of the state and whose liability in the case of corporate overextension and failure is limited to the amount they each personally invested. Although the analogy can be carried too far, the point is that the financial overextension of a corporation is limited in its adverse effects; to adopt a provision similar to that considered by the Hawaii delegates would be to limit the exigencies of individual overextension.[42]

The Illinois Constitutional Convention Committee on the Bill of Rights considered several alternatives to wording nearly identical to Montana's. One proposal stipulated that no person could be imprisoned for a debt arising out of a contract unless there was fraud or a breach of trust.[43] Another proposal would have abolished imprisonment for debt in civil cases; it also would have forbidden imprisonment for failure to pay a fine in a criminal case unless the fine was assessed in accordance with the defendant's ability to pay, he had ample time to make payment and had failed to do so. A third proposal simply would have abolished all imprisonment for debt.[44]

These alternatives should provide groundwork for discussion of the Montana Constitution provision on debtor imprisonment. Given the Federal Constitution's silence on this matter, there is ample room for state initiative.

TREASON

James Madison's notes of the Federal Convention of 1787 show the concern of the Founding Fathers with incorporating strict procedural safeguards into any treason clause placed in the federal document. Of the delegates who took part in the debate on the proposed treason provisions, all showed a surprising degree of familiarity with one particular mid-fourteenth century English statute on treason. The statute was one passed under Edward III and became the basis of the typical American wording of treason provisions. The intimate knowledge of this statute possessed by the constitution-makers is perhaps not so difficult to understand because virtually every member of the Convention had himself committed treason a few years earlier.[45]

Beyond that, the Americans who were writing the fundamental law were well versed in English law history; they were particularly mindful of the royal efforts to contravene the rights of Englishmen and induce obedience by force. Beginning with the famous trial, conviction and assassination of Thomas Becket, then Archbishop of Canterbury, the delegates at the Federal Convention knew very well the history of two centuries of the crime of "accroaching the royal power" and "compassing and imagining the death of the king." Edward III had been particularly inclined to name as treason "almost every offense that was, or seemed to be, a breach of the faith and allegiance due to the king. . . ."[46]

Throughout the debate on the treason provision the Founding Fathers made clear their desire for a restricted treason clause. They required two witnesses to the same overt act or a confession in open court; they prohibited the legislature from declaring one or a group to be treasonous. Most important, they worded the provision so that treason was to encompass only what was expressly provided for in the treason clause. It seems that those who understood the sometimes uncomfortable exigencies of political conflict and whose ultimate foundation was the necessity of resistance renewed their commitment to a broad latitude for that very kind of activity.

Article III, Section 9 of the Montana Constitution expresses in this tradition-rooted language the crime of treason:

> Treason against the state shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his confession in open court; no person shall be attained of treason or felony by the legislative assembly; no conviction shall work corruption of blood or forfeiture of estate. . . .

This section was adopted without debate in the 1884 and 1889 constitutional conventions and has not been applied by the courts.

Tacked on to the end of Section 9 is a sentence which has been called "a curious example of the delegates' anxiety to include certain material in the constitution without really caring where it was included."[47] Consideration could be given to better placement of the sentence, which states that "the estates of persons who may destroy their own lives shall descend or vest as in cases of natural death."

CHAPTER IX

NOTES

1. William H. Young, Ogg & Ray's Introduction to American Government (New York: Meredith Publishing Co., 1962), pp. 81-82.

2. Alexander Hamilton, The Federalist Papers, No. 84 (New York: New American Library, 1961) pp. 513-514.

3. Slaughterhouse Cases, 16 Wallace 36 (1873).

4. Griswold v. Connecticut, 381 U.S. 479 (1965).

5. Ibid., p. 484.

6. Ibid., pp. 486-487.

7. The Montana courts do not seem to have made significant rulings or to have announced any new rights under the provisions of Article III, Section 30.

8. Albert L. Sturm, "Trends in State Constitution-making 1966-1970," Prepared for Publication in William and Mary Law Review 13 (1971), p. 21 in prepared copy.

9. Illinois, Constitutional Convention 1970, Committee on the Bill of Rights, Proposal No. 1 (Springfield, 1970), Section 14. Cited hereafter as Illinois Bill of Rights Committee, Proposal No. 1.

10. Ibid.

11. 81 Corpus Juris Secundum, Sec. 214. Cited hereafter as C.J.S.

12. 81 C.J.S. Sec. 215a.

13. 81 C.J.S. Sec. 215c.

14. South Dakota, Legislative Research Council, The Feasibility of Abolishing or Modifying the Doctrine of Sovereign Immunity in South Dakota (Pierre, 1967), p. 2. Cited hereafter as South Dakota Legislative Research Council, Sovereign Immunity.

15. Ibid.

16. 81 C.J.S. Sec. 216.

17. Ronald B. Lansing, "The King Can Do Wrong. The Oregon Tort Claims Act," Oregon Law Review 47 (1967-8): 358.

18. William P. Tanner III, "Government Immunity in Kansas: Projects for Enlightened Change," Kansas Law Review 19 (1971): 211. Cited hereafter as Tanner, "Government Immunity."

19. South Dakota Legislative Research Council, Sovereign Immunity, p. 1.

20. Ibid.

21. Mower v. Leicester, 9 Mass. 247 (1812). The English precedent is Russell v. Men of Devon, 100 Eng. Rep. 359.

22. Cohens v. Virginia, 19 U.S. (Wheat.) 264, 380 (1821).

23. Kaldahl v. State Highway Commission, Opinion No. 12071, November 4, 1971.

24. See Stone v. Arizona Highway Commission, 381 P.2d 107; Mishoph v. Corning Hospital District, 359 P.2d 457, and Smith v. State, 473 P.2d 937, 944.

25. For a list of state court cases which have abolished and reaffirmed the doctrine, see Colorado, Legislative Council, Governmental Liability in Colorado (Denver, 1968), pp. 99-107.

26. Kawananahn v. Polyblank, 205 U.S. 349, 353 (1907).

27. A. J. Moore, Federal Practice (2nd ed., 1970), Sec. 20.07 [3], p. 2864. Cited hereafter as Moore, Federal Practice. John E. H. Sherry, "The Myth That the King Can Do No Wrong," Administrative Law Review 22 (1969): 39, 43; Cited hereafter as Sherry, "King Can Do No Wrong."

28. Sherry, "King Can Do No Wrong," p.43.

29. Moore, Federal Practice, Sec. 20.07 [3], 2864.

30. William L. Prosser, Torts (2nd ed., 1964), Sec. 125, p. 1001.

31. Tanner, "Governmental Immunity," p. 212.

32. Ibid.

33. Walter Gellhorn and C. Newton Schench, "Tort Actions Against the Federal Government," Columbia Law Review 47 (1947): 722.

34. Arvo Van Alstyne, "Governmental Tort Liability: A Decade of Change," Illinois Legal Forum (1966): 916, 921.

35. Harold W. Kennedy and Robert C. Lynch, "Some Problems of a Sovereign Without Immunity," Southern California Law Review 36 (1963): 176.

36. Tanner, "Governmental Immunity," p. 213.

37. Ibid., p. 230.

38. See, for example, Iowa Constitution, Article I, Section 19.

39. See, for example, the Rhode Island Constitution, Article 1, Section II.

40. 16 C.J.S. Sec. 204(1).

41. Hawaii, Legislative Reference Bureau, Article I: Bill of Rights, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, 1968), p. 119.

42. For sample wording of this provision, see Section 1.02 of the Model State Constitution. [National Municipal League, 6th ed. rev. 1968 (New York, 1963, 1968)]. The Mississippi Bureau of Public Administration also recommended such a provision. [Mississippi, Bureau of Public Administration, Yesterday's Constitution Today (Oxford: University of Mississippi, 1960), p. 22.] The Wisconsin provision [Art. I, Secs. 16 and 17] covers two sections, the second of which reads: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting reasonable amount of property from seizure or sales for the payment of any debt or liability hereinafter contracted." Article II, Section 8 of the Puerto Rico Constitution provides in part: "A minimum amount of property and possessions shall be exempt from attachment as provided by law."

43. The South Carolina Constitution provides [Art. I, Sec. 1]: "No person shall be imprisoned for debt except in cases of fraud."

44. Illinois Bill of Rights Committee, Proposal No. 1, Sec. 12.

45. Irving Brant, The Bill of Rights: Its Origin and Meaning (New York: New American Library, 1965), p. 23.

46. Sir Matthew Hale, The History of the Pleas of the Crown (Lundon, Sollom Emlyn, 1788), p. 83.

47. Emilie Loring, "Montana's Bill of Rights," unpublished paper from Department of Political Science, University of Montana, Missoula, p. 14.

CHAPTER X

NEW PROVISIONS

This chapter deals with three areas in which the Montana Declaration of Rights is silent. Time considerations enforced the decision to consider only these few of the rights areas which are open should the state decide to pursue the previously discussed "little laboratory" function as the initiator of new rights. The three areas discussed are: the rights of persons under the age of majority, the right to be free from discrimination and to be accorded the equal protection of the laws, and one of the remedies sometimes suggested in the area of consumer protection, the class action suit. Another report for the Montana Constitutional Convention discusses another issue particularly relevant to Montana, the rights of Indians.

RIGHTS OF PERSONS UNDER THE AGE OF MAJORITY

According to a recent book on the rights of persons under the age of majority, "no area of the law is in greater flux than that of kids' legal rights. For almost every court decision granting a specific right to a student or a minor, there is another decision denying him the same right."[1] The problem is not that there are conflicting court decisions on the rights of persons under the age of majority--that is true of other areas of civil liberties law--but that there is not even a broad outline of the types of rights young people possess.

In general, the assumption behind what is called "juvenile law" in the United States has been that minors need special treatment at the hands of parents, courts, police, the state, schools and other institutions. This is based on the theory that a case involving a youth in violation of the law is not the same type of case as one involving an adult criminal. Accordingly, juvenile courts supposedly operate on a more flexible set of standards and procedures than are used in the adult courts. More stress, at least theoretically, is placed on rehabilitation. This resort to special treatment, based on a valid distinction between the adult criminal and the young offender, has not been free of costs, however. Because they are not considered criminal defendants, youths are not generally accorded the rights constitutionally guaranteed to criminal defendants. In other words, they are <u>not</u> generally protected by constitutional standards of fairness and due process of law such as the right of counsel, trial by peers or a jury, the right against self-incrimination, and the right to know the nature and cause of the accusation.[2]

One example of how the courts have had difficulty deciding whether children have the same rights as adults can be seen in cases dealing with length of hair. An Ohio district court cited an opinion by Justice Frankfurter in ruling that children did not have the right--accorded to adults--to wear their hair at any length they desired. Justice Frankfurter had written on another matter that

> it is obvious that the problem presented by the facts of this case cannot be solved by reference to cases concerned with the constitutional rights and liberties of adults. Children, of necessity, cannot be uncritically accorded those rights, and it is foolish to say they can be.[3]

But as the Montana Law Review has noted, this case has standing against it "virtually every other hair decision."[4] [As this report went to print (December 30, 1971), a federal district court judge in Montana upheld a hair code and with it, the suspension of a Hamilton High School student. In doing so, the court placed the burden of justification of hair length on the student, not on the regulation. The above Montana Law Review article notes that, in general, the burden of proof is placed on those who propound the regulation; they must show it to be actually disruptive.]

Most cases involving persons under the age of majority point to the 1969 armband case, Tinker v. Des Moines School District, where Justice Fortas, writing for the majority said:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state.[5]

This difficulty--that minors have fewer constitutional rights than adults--is especially difficult to understand when it is noted that they are liable for punishment for many more offenses than are adults: disobedience, running away from home, staying out late, associating with persons deemed "undesireable," being late for school, wearing their hair long or wearing armbands, publishing opinions critical of school administrators and so on.[6]

In these and other ways, a juvenile court process which was designed to be a flexible, highly personalized and relatively lenient system of dealing with youth offenders may tend to become arbitrary, impersonal and punitive. This situation has not gone unnoticed; the U.S. Supreme Court has handed down several decisions which have compelled some states to revamp long-established practices and procedures in juvenile cases.[7]

The general direction of Supreme Court decisions in this area is increasingly toward granting youths many of the procedural safeguards adults possess. In doing so, the Court has repeatedly emphasized the differences between juvenile proceedings and adult criminal proceedings and that it does not wish to convert the former into the latter.[8] The Court has not held that an accused juvenile is entitled to all the procedural safeguards accorded an adult. It has held to be significant certain state-level disparities of treatment between juveniles and adults; however, it has not ruled procedural disparities to be impermissible per se.[9]

In general, the Court's decisions have been based on the due process clause of the Fourteenth Amendment and have turned on the question of whether a particular procedural right is one of the essentials of due process and fair treatment. Five broad procedural guarantees have been held to be binding on juvenile courts: a juvenile charged with delinquency has the right to receive written notice of the charge or factual allegations against him at an early enough date to prepare a defense; he must be given a warning on the right of counsel; he must be notified of his right to remain silent and he has the right against self-incrimination at a delinquency hearing; adjudication of his guilt must be based on the sworn testimony of witnesses with the defendant's rights of confrontation and cross-examination assured, and he is entitled to the presumption of innocence in that his guilt must be proven beyond reasonable doubt.[10]

Court activity notwithstanding, there are still many questions unresolved in the area of rights of persons under the age of majority. Court activity in this area has centered around the procedural rights at the adjudicative stage of proceedings; even within this stage of proceeding, there are unanswered issues. Outside of the adjudicatory state of proceedings, there are procedural questions in the pre-trial and dispositional stages. For example, does a young person have the right to be free from unreasonable searches and seizures? What are the conditions of any pre-hearing detention that he may be subjected to? Should the involuntary confession standards of the type suggested by the Miranda decision (precluding subtly or overtly coerced confessions and granting the suspect's right to have

counsel present) be more strictly applied in the case of juveniles who face the peril of being transferred for criminal trial?[11] In the dispositional state, does the juvenile have the right to some agreed upon adequate treatment? Other examples of the difficult questions surrounding the procedural rights which young persons should possess could be cited. In addition, there are important questions concerning the substantive rights of young persons.

For aid in resolving these questions, there are apparently no formulas for deciding what rights to guarantee youths; however, some broad guidelines which lend themselves to constitutional explication can be seen in the following provisions.

Various suggestions have been made--some by Montana citizens groups--for constitutional provisions on the rights of persons under the age of majority. One commentator, writing that "there are no easy solutions to any of these problems," has added:

> [A] minimal beginning would be an enforced recognition that kids are people, with basic constitutional rights under the law . . . Once these fundamental rights have been guaranteed and enforced, modifications could be made which would take into account a person's age as a factor in holding him responsible for his actions.[12]

Montana's Community Planning Coordinator, in conjunction with the Rural America Project for Youth Development and Delinquency Prevention and staff members of the Community Coordinated Child Care Project, has recommended the following provision for consideration by the Convention: "Every child and youth shall have all the rights of a Montana person except for those rights specifically precluded by law."[13] Other provisions suggested by the Montana Program Committee of the American Friends Service Committee, include:

> 1. Every child and youth has the right to that emotional, social, physical, educational and moral environment necessary to attain his or her full potential.
>
> 2. All parents shall have the right to guide and influence the education and development of their children.
>
> 3. There shall be no discrimination on the basis of age for persons over the age of 18, except for treatment of persons between the ages of

> 18 and 25 who have been convicted of a felony, and those under the age of 18 shall be guaranteed all the rights of a person consistent with their maturity.[14]

The second of the above provisions is designed to insure that parents have some rights against state pre-emption of their authority over their children and to make certain that the rights-of-children clause is not completely open-ended. An example of the kind of conflict that could develop in the area of governmental interference with the rights of parents can be seen in a 1924 U.S. Supreme Court decision, Pierce v. Society of Sisters.[15] In this case, the Court ruled:

> [T]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[16]

Accordingly, the Oregon Compulsory Education Act, which required parents to send children between the ages of 8 and 16 to public schools, was declared an unconstitutional infringement of the liberty of the Fourteenth Amendment. The Court said:

> [T]he right to conduct schools [is] property and the parents and guardians, as part of their liberty, might direct the education of children by selecting reputable teachers and places . . . . [W]e think it plain that the [Oregon Compulsory Education] Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.[17]

In the final analysis, the main question is not whether the rights of young persons under the age of majority are identical with those of adults. As the recent White House Conference on Children reported to the President, the issue is "how the limits of adult control may be drawn so as not to infringe on the child's right to grow in freedom in accordance with the spirit of civil liberties embodied in the Constitution."[18]

EQUAL PROTECTION AND FREEDOM FROM DISCRIMINATION

Rights of Aliens

Section 25 of Article III of the Montana Constitution announces certain rights accorded to aliens:

> Aliens and denizens shall have the same right as citizens to acquire, purchase, possess, enjoy, convey, transmit, and inherit mines and mining property, and milling, reduction, concentrating, and other works, and real property necessary for or connected with the business of mining and treating ores and minerals: provided that nothing herein contained shall be construed to infringe upon the authority of the United States to provide for the sale or disposition of its mineral and other public lands.

This provision, granting aliens and denizens (persons in the process of becoming citizens) the same rights as citizens with respect to investing in the state's mining industry, has a curious history. As the provision reached the floor in the 1889 Convention, it provided: "No law shall be enacted which will prevent persons of foreign birth or residence from becoming the owners of mines or mining property, except under the restrictions contained in the laws of the United States relative to the location thereof." Delegate Dixon immediately moved to amend it to roughly the current wording. But Delegate Collins argued that the section did not have a place in the fundamental law--that it was "legislation pure and simple."[19] Collins believed that the section did not refer to rights and liberties and therefore should not be placed in the Declaration of Rights. The thrust of the debate was then revealed when Delegate Dixon justified the constitutional statement of the inheritance right as an inducement to foreign capital. Then, Delegate Clark said:

> [I]t is well that the people of Montana should be allowed a certain liberty and scope in the sale of their mines to foreign capitalists who have plenty of money, thereby to induce them to come here and build large smelting plans and large mills and other enterprises of that kind, which would necessarily involve the expenditure of large sums of money and result in the fostering and development of other great industries in this country.[20]

Delegate J. K. Toole of Lewis and Clark added his weight to the argument favoring the recruitment of foreign capital, saying "I concur in the suggestions of [Clark] . . . that we need and want and ought to invite the acquisition, especially as directly connected with the development of the mining interests of this country, of foreign capital."[21]

In later debate, delegate Whitehill attempted an amendment which would have extended the rights of alien residents to possess all forms of property, the same as native born citizens. The Whitehill amendment, in effect, would have incorporated into the 1889 Constitution one of the few provisions of the Colorado Declaration of Rights which Montana's Convention of 1884 passed over. As noted before, the Montana Declaration of Rights was almost a carbon copy of the Colorado Declaration. The Colorado Constitution, in Article II, Section 27, provides that "aliens, who are or may hereafter become bona fide residents of this state, may acquire, inherit, possess, enjoy and dispose of property, real and personal, as native born citizens." Delegate J. R. Toole of Deer Lodge spoke against the Whitehill amendment urging support for "the privilege of disposing of mining property to non-residents." The Whitehill amendment was lost and the provision stood substantially as it reads today.[22] There is general agreement among commentators on the Montana Constitution that this section is obsolete and ought to be repealed.[23] However, neither of the two groups (the Legislative Council or the Constitution Revision Commission) suggesting its repeal made a point of stating the Montana Declaration's silence on two closely related issues: equal protection of the laws and freedom from discrimination. Currently, there is no Montana constitutional provision covering either area.

Involuntary Servitude

Another provision of the Montana Constitution is relevant to a discussion of freedom from discrimination and equal protection of the laws. Article III, Section 28 provides: "There shall never be in this state either slavery or involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted." Both the Legislative Council study and the Constitution Revision Commission deem this section unnecessary; both propose that it should be deleted. The Legislative Council study notes that the federal Constitution's Thirteenth Amendment guarantees that there will be no involuntary servitude in the nation.[24]

These two studies are probably correct in saying there is no necessity for continued state-level recognition of this right; the substantial questions currently being raised surrounding involuntary servitude are mainly challenges to federal military conscription. If the state were to make any constitutional statement on its own military procurement practices (such as exempting from bearing arms those with conscientious scruples), it would be advisable that such a statement be explicit rather than rely on an involuntary servitude concept which is part of the legacy of the Civil War. However, the primary question with which such a provision dealt--the human status of racial and cultural minorities--is still very relevant today. The problem is perhaps less one of "involuntary servitude" than of various discriminatory practices, unequal applications of the laws and unrealized potential for minority community self-determination.[25] Only a more specific statement of what constitutes involuntary servitude would apply it to immediate problems in these areas.

Equal Protection of the Laws

In the early 1640s, the magistrates and freemen of Massachusetts were engaged in a dispute over the enactment of a general, written Body of Liberties. The magistrates exacted concessions from the freemen to provide that such a document should not be binding, but only advisory, and in considering any question to which the Body of Liberties did not speak, the magistrates were left to decide the matter in accordance with the "word of God."[26]

Section 2 of this weakened Body of Liberties is relevant in this context; it extended the Magna Carta provision on the denial or delay of the right of justice to effect equal protection of the laws:

> Every person within this Jurisdiction, whether Ihhabitant or foreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another without partialitie or delay.

Similar language eventually became part of the Fourteenth Amendment to the United States Constitution: "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment forbids the states from denying the equal protection of the laws; to repeat this prohibition is more an affirmation of the Federal principle than the enunciation of a new state commitment to equal application of the laws. If the state desired to go beyond the federal

Fourteenth Amendment, constitutional wording could be included guaranteeing equal protection of the laws regardless of sex, income, or other specific attributes not covered by the Fourteenth Amendment.

Freedom From Discrimination

Contrary to the apparent innocuousness of a state commitment to equal protection would be the potential of a strong clause on the freedom from discrimination. Although the federal government has been quite active in this area since the days of the 1954 school desegregation decision, the kind and amount of federal activity is still at issue. For example, the U.S. Senate has yet to pass a House approved Equal Rights Amendment which would announce that there shall be no discrimination on the basis of sex. In fact, it was the Supreme Court, not Congress, that recently took a step in ruling that what it called "arbitrary" discrimination on the basis of sex was unconstitutional. At issue was an Idaho law--similar to a Montana law--which gave preference to males in the administration of estates.[27]

The two most important federal enactments affecting the rights of women since the adoption of the federal Nineteenth Amendment are the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. The Equal Pay Act prohibits all employers covered by the Federal Labor Standards Act (FLSA) from paying wage differentials based upon sex for equal work on jobs, the performance of which requires skill, effort, responsibility, and which are performed under similar working conditions. The Act is administered by the Wage-Hour Division of the Department of Labor and the Secretary of Labor is authorized to seek injunctions for violations. As one commentator has written, "the overall effectiveness of this legislation is limited by the number of exceptions permitted and the exemptions from coverage by FLSA."[28] Title VII of the Civil Rights Act of 1964 prohibits sex-based discrimination by employers, labor organizations and employment agencies except in circumstances in which sex is a bona fide occupational qualification reasonably necessary to the operation of a business. The sex discrimination provisions of this Act "constitute the beginnings of a broad attack against sex discrimination, but much remains to be done if the promise of the 1960's is to be fulfilled."[29]

In broader questions of civil rights, the federal government seems to have done little better, perhaps even worse. A

recent annual staff report of the U.S. Civil Rights Commission said that the federal government's enforcement of civil rights laws improved only from "poor to marginal" during the past year. The staff report laid principal blame for the lax effort as the doorstep of the Nixon Administration. Rev. Theodore M. Hesburgh, the Commission chairman and president of Notre Dame University, disagreed with the staff, but only on the point of who was to blame. Hesburgh said that the main problem may have more to do with the machinations of the federal bureaucracy. Last year's report from this agency noted inertia and hostility that could nullify the effect of recent federal civil rights legislation.[30]

The point is not whether the administration or the federal bureaucracy is to blame; rather, it is that federal activity in this field does encounter obstacles which apparently have limited its effectiveness. One should not assume that the enactment of federal legislation is anything but a beginning in the area; perhaps further activity in this area by the states is well-justified.

Several states provisions prohibiting various forms of discrimination display a wide variety of phrasings and applications. Most are phrased in language broadly referring to "the enjoyment of civil or political rights" or "rights, privileges and immunities." A typical provision is that of Article I, Section 2 of the Michigan Constitution:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The Legislature shall implement this section by appropriate legislation.

The Illinois Constitutional Convention Committee on the Bill of Rights, after reviewing possible alternatives to anti-discrimination provisions, decided that the potential affect of provisions of the Michigan variety was limited. The committee decided that to insure that such provisions would apply in a forceful way to private as well as public discrimination, they should be more explicit as to the areas they covered. The provision the Illinois committee drafted as a supplement to the clause guaranteeing the equal protection of the laws, reads:

> Every person shall have the right to freedom on the basis of race, color, creed, national ancestry or

> sex in the hiring and promotion practices of any employer or in the sale or rental of property. These rights shall be enforceable without action by the General Assembly, but the General Assembly may establish reasonable exemptions relating to these rights and may prescribe additional remedies for the violation of these rights.

The provision is now Article I, Section 17 of the Illinois Constitution.[31]

The Revised Codes of Montana contain two statutes on discrimination. Section 64-211 reads:

> No person, partnership, corporation, association, or organization owning or managing any place of public accomodation or amusement shall discriminate against any person or group of persons solely on the ground of race, color or creed.

Sections 64-301 to 64-303 recognize the civil right to be free from discriminations based on race, creed, color, sex and national origin as a civil right. In addition to these statutes, Article XI, Section 9, of the Montana Constitution reads in part: "nor shall any person be debarred admission to any of the collegiate departments of the university on account of sex."

The Montana statutes and constitutional provision fall shy of the protection afforded by the Illinois Constitutional provisions. After hearing many witnesses, the Illinois committee decided to limit its provisions to the areas of employment and the sale or rental of property--that is, they cover private discriminations beyond fair employment practices. The New York Constitution contains a provision in Article I, Section I, which speaks broadly to prohibit all private as well as public discrimination:

> No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Even this provision does not explicitly extend the freedom from discrimination in the manner accomplished by the Illinois provision. The real potential of the Illinois provision is that it creates a new right for persons in the state. Any person aggrieved could have access to existing judicial remedies for a

violation of the right by the last clause of the provision which states: "these rights shall be enforceable without action by the General Assembly . . . ." This is in contrast to the current Montana statutory remedy for public discrimination, which is a misdemeanor conviction.

It can be argued that Montana, with a significant and, culturally speaking, priceless minority population, is especially suited to the adoption of strong anti-discrimination provisions enforceable by those affected. This is even more the case given the increasing cultural awareness and pride of minorities within the state, as well as the legitimate concerns of emerging women's rights groups.

The Illinois Convention also did some innovative work in other areas of discriminatory practices. Two additional provisions were incorporated into the state's Constitution, one covering discriminations against the handicapped, the other prohibiting sex discrimination. Interestingly enough, neither of these provisions hints at the aggrieved's right to enjoin discriminatory practices as does the provisions on discrimination in employment practices and in the sale and rental of property. Article I, Section 19 of the Illinois Constitution provides:

> All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

The sex discrimination provisions do not guarantee freedom from private discriminations. Article I, Section 18 provides: "The equal protection of the laws shall not be denied or abridged on account of sex by the state or its units of local government and school districts."

Conclusion

It is significant that Montana's eighty-year-old provision giving aliens the right to invest in the state's mining industry could be replaced by one guaranteeing and extending the principle of equal protection of the laws by giving to all persons who bear the burden of discrimination the power to confront and eradicate it through the judicial process. At any rate, this is certainly one of the most sensitive areas of

possible constitutional revision and the place where a gap in the Montana Declaration of Rights is most clear. A significant commitment to equal protection of the law and the freedom from various discriminations could be made at the level of the fundamental law where none now exists.

CONSUMER PROTECTION AND THE CLASS ACTION SUIT

The Frustrated Consumer

Another area of a potential new right is that of consumer protection. Although the laws of contract and the supposed competitive market system are sometimes thought to be reliable safeguards against practices unfair to the consumer, such often is not the case.[32] In an age when advertising's informational qualities have disintegrated to the point of sheer hyperbole, this perhaps is not too surprising. Philip Schrag has noted:

> American manufacturers are now finding the cost of expert supervision over quality control to be so great that they are frequently willing to accept a high rate of defective products; it is cheaper to replace merchandise for those consumers who complain than to ensure that few defective products are distributed.[33]

The Council of State Government has listed some of the major causes of current consumer concern. One of these centers around the health and safety of various goods. Unlike criticisms offered below of the market place itself, this area has been the target of considerable legislation and regulatory activity. Such things as pure food and drug laws, labeling of poisons and explosives, control of the sale of drugs, meat inspection, produce grading, labeling of feeds and pesticides and other activities are examples of some success. The Council of State Governments has noted that there are still some legal obstacles to optimum compliance with health standards; in general, the suggested remedies concern beefing up the institutions which are charged with the enforcement of the standards.[34]

Another area of concern is the problem of deceptive and fraudulent selling. It is difficult to define precisely the problem--not only is it difficult to ascertain what is and is not deceptive, it is also hard to formulate standards which distinguish between practices which are undesirable and those which are illegal. A wide range of old and new practices are common to deceptive

advertising. For example, one of the salient characteristics of much advertising is the use of meaningless terms. Jargon that is designed to evoke a favorable response without saying anything is found on billboards, store counters, packages and in the media. As this kind of advertising is generally accepted as routine, the old rule of caveat emptor--let the buyer beware--is especially applicable to a situation in which maximum expectation is extracted on minimum information.

Other deceptive practices include giveaway enticements such as trading stamps, puzzle prizes, and free items, referral selling, bait and switch tactics, fictitious discounts, high pressure selling, short weights and measures, misrepresentation of standard products and even warranties.[35] The laws dealing with misrepresentation and warranty, complex as they seem, apparently are not as adequate as they might be.[36]

Considerable dissatisfaction with the marketing system itself is evidenced in several ways. Consumers tend to feel unrepresented in the ways policy is determined in the marketplace.[37] That is, there is considerable disenchantment with the old idea that the dollar is an effective ballot in the marketplace. John Kenneth Galbraith has written of the withering of supposed "consumer sovereignty" in the face of various marketplace imperatives.[38]

Other consumers contend that the marketplace provides no place for complaints to be systematically aired and resolved. Just as in the case of the federal bureaucracy in government, it is difficult in the impersonal marketplace to fix responsibility; it also is difficult to rejuvenate the marketplace once an item is found to be unsatisfactory for whatever reason.[39]

Another disconcerting and symptomatic aspect of the marketplace is the difficulty of making value comparisons. The number of competing items, unfair packaging practices and the use of meaningless terms and slogans such as "economy," "giant," "bargain" or "why pay more?" tend to mislead and destroy the solid base for making good value choices. In light of the above increasingly commonplace criticisms, it may be somewhat suprising that "consumers lack the oldest and most fundamental civil liberty: the right to a day in court."[40]

Natural barriers to the prospective consumer client are high. For example, the costs of litigation are so exorbitant that they are scarcely justified by the amount of even a major consumptive purchase. As Bess Myerson Grant stated before a

congressional hearing on consumer affairs: "[Our laws tell the consumer] to spend thousands of dollars on a lawsuit to recover hundreds of dollars which he lost in a swindle."[41]

The core of the problem is one of reforming existing legal remedies and of improving the consumer's opportunity to confront his abuser. Several approaches suggest themselves for consideration: the institution of some decentralized, informal judicial practice to decide small-claims, a consumer education program, regulation of the seller, a state-level consumer protection agency or changing the buyer-seller relationship. Other possibilities, such as the organization of consumer pressure groups, require collective effort of a kind distinct from constitutional action. What will be attempted below is a discussion of one of the ways the Council of State Governments has suggested for changing the buyer-seller relationship: the class action suit is discussed as one form of a right of citizen access to the judicial system for rectification of wrong. What will be said about the class action suit for consumer protection also is applicable to the discussion of the citizen's right to sue to enforce standards of environmental quality and other citizen interest suits.

The Class Action

The problem to which the class action suit speaks is indicated by two commentators who wrote in 1940:

> [M]odern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.[42]

The legal remedy which the processes of mass production, distribution and consumption seem to require is of a particular sort. Since it is likely that a wrong initiated by a producer will affect not just one or a few, but a whole class of

persons, and since an injury of this sort can be enormous in the aggregate while still too small to justify the expense of litigation by one victim, increasing concern has been directed toward allowing persons to litigate as a class. Hence, the term class action.[43]

The class action suit thus far has provided effective redress for a variety of small litigants. Class actions have been used by depositors in savings and loan associations to recover for misrepresentation in the sale of stock, by welfare recipients to challenge welfare regulations, by minority groups seeking protection of their civil rights, by taxpayers to recover money wrongfully appropriated, by wage earners to recover wrongfully withheld pay, and, more recently, in Montana, by citizens for environmental damages.[44]

One commentator, writing on the special applicability of the class action suit to consumer protection has said:

> Consumers as much as any group are frequently damaged in relatively small amounts, whether by illegal overcharges, broken warranties, or deceptive trade practices. A slight overcharge of many consumers can easily amount to thousands and even to millions of dollars of illegal profit. Individual litigation is unlikely to deter a dishonest seller from a wrongful course of conduct that is producing enormous profits, for he can absorb the expense of paying isolated claims or defending against them as a cost of doing business. However, a suit by an entire class of similarly injured consumers would quickly make such conduct unprofitable. Thus, class suits, and even the threat of class suits, can have a "therapeutic effect" on the conduct of business activities.[45]

Justice Story's Equity Pleadings outlined the traditional common law view of class suits. Three basic conditions are offered for a cause of class action: (1) the question must be one of common or general interest and the suit or defense must be for the benefit of the whole; (2) those who sue, or defend, must fairly be presumed to represent the rights and interests of the whole, and (3) the parties may be very numerous, have separate and distinct interests and bring such a suit only where it is impracticable to bring them all before the court.[46] The old Field Code provision on class actions codified these class action statutes.

> [W]hen the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.[47]

Twelve states have adopted the Field Code provisions (or very similar provisions) at the statutory level.[48] Most of the states which rely on the common law permit class actions only in cases of equity. Other states, Montana included, follow some version of federal Rule of Civil Procedure 23 or its 1966 amended form.[49]

The current Montana statutory provisions on the class action are contained in the Rules of Civil Procedure as found in the Revised Codes of Montana, 1947, Volume 7. Rule 23 states the prerequisites of a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23 (b) further defines the circumstances under which a class action can be maintained. In addition to the above prerequisites, this section provides that the class action is justifiable only if the prosecution of separate action would create the risk of varying adjudications or impede the ability of individuals to protect their interests. Two other requirements also are specified. Final injunctive or declaratory relief must result from the refusal of the party opposing the class to act on grounds generally acceptable to the class. The court also must find that the concerns expressed by the class predominate over individual members of the class and that the "class action is superior to other available methods for the fair and efficient adjudication of the controversy." In determining this, the court can consider several other factors explicit in the class action rule.

The Montana Supreme Court recently refused to assume supervisory control over a case which a district court had admitted as a class action. The suit was lodged by some 1,500 northwest Montanans against the Anaconda Company operations in Columbia Falls environmental damages in the amount of $14

million. The effect of the court's decision was to permit the district court to continue hearing the suit as a class action.[50]

In general, courts have held there are four prerequisites to the maintenance of a class proceeding: (1) parties too numerous to bring before the court by use of joinder--a consolidation of all causes of action into one suit; (2) a defineable class; (3) a question of common interest to the class; (4) plaintiffs who adequately represent the class.

Cases arising on the question of the proper number required to bring a class action have set minimums ranging from three to 100.[51] The main requirement seems to be that they be so numerous as to make a joinder impracticable.

Under the problem of defineable class, courts have required that the class be of some uncertain minimum size and that it also have outer limits that permit the class members to be distinguished. The court must be able to determine who is bound by its decision because later claims by persons not part of the class could cause problems without some requirement of this sort. On the other hand, too strict an interpretation of this requirement could quickly preclude all class litigation.

The most basic requirements for a class action is that there be a question of law or fact of common interest to the class. As indicated in Chapter III, questions of common interest and common good do not lend themselves to easy explanation. Some courts have adopted guidelines designed to clarify this point. These include: applying compulsory joinder to stop class actions (compulsory joinder is the idea that any class action involving separate injuries occurring at different times and giving rise to individual causes of action would be disallowed);[52] generally disallowing class suits for monetary damages;[53] denying the suit if the class does not have a common interest in the relief sought, and, in a few courts, requiring the existence of a limited common funds as a prerequisite to a class action.[54]

The fourth requirement for a class action is one not mentioned in the Field Codes or in Justice Story's comment on the common law: the party must adequately represent the class on whose behalf litigation is brought. Some courts have merged this concept with that of common interest and require a "community of interest" between the plaintiffs and the class members.[55] Generally speaking, adequate representation means there can be no collusion between the interests of other members of the class. On this point, courts have tended to be

more willing to find adequate representation in cases where the class members have a joint interest than in cases where the claimants are strangers to each other.

Adequacy of representation is also a constitutional requirement if a judgment in a class suit is to be binding on the absent members of the class. To hold otherwise, according to the U.S. Supreme Court, would deny due process to the absent members.[56] If a person is adequately represented by the plaintiff, he is bound by the decision under a recognized exception to the Anglo-American law. The exception provides that

> the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it . . . . This court is justified in saying that there has been a failure of due process only in those [class actions] where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it.[57]

The concept of adequate representation--based on representation of absent members of the class--is different from the type which must be established to initiate a class action at the outset. Thus, while the plaintiff may pass the first standard and be allowed to represent his class initially, he may not satisfy the constitutional standard when the judgment is sought to be applied to an absent class member. At that point, if the representation is adjudged constitutionally inadequate, the initial judgment would not bind absent members of the class.[58]

In conclusion, one commentator has written:

> At a time when there is increasing documentation of widespread consumer exploitation, state courts should be less rigid in their attitudes toward class proceedings and more sensitive to the need of consumers for increased protection. Disrespect for a legal system is likely to develop when its laws promise more rotection than they provide. Unless the law supplies an economically feasible procedure for persons to enforce their rights, violation of those rights is encouraged. Class litigation is one way to help insure that, in practice as well as theory, every wrong shall have a remedy in our courts.[59]

In addition, the Council of State Governments has referred to state activity in this area as an "imperative for federalism."

> Federal, state and local officials and units of government will doubtless increase their actions in relation to the economic welfare of consumers. This appears desireable for the problems are serious, fundamental, and varied. Certain action in relation to them is best suited to each level of government, and some, as consumer education, may involve all levels. No level of government is competent to deal with all consumer problems and interest. Combined, in concert, they can.[60]

To be sure, not much activity in the area of consumer protection can be found at the level of state constitutions. As noted in Chapters VIII and IX, there has been some activity in the area of the citizen's right to sue government and corporations. One example of a consumer protection proposal can be seen in the defeated Maryland Constitution in 1968. Section 9.07 provided: "The General Assembly shall provide by law for the protection and education of the citizens of the state against harmful and unfair business practices." Such a provision would leave the question of the class action to the legislature; indeed, it substantially leaves to the legislature the whole question of consumer protection. It requires no institutional change (such as establishing an office for consumer complaints), nor does it provide remedy for citizens when they become educated on a matter of importance to consumers. Another alternative is some broad statement of the right of an adversely affected class of citizens to a day in court.

NOTES

1. Jean Strouse, Up Against the Law (New York: Signet Books, 1970), p. xi. Cited hereafter as Strouse, The Law.

2. Ibid., p. xii.

3. Cordova v. Chonko, 315 F.Supp. 933 (N.D. Ohio 1970), citing May v. Anderson, 345 U.S. 528 (1952). Both cited from James D. Moore, "In-hair-ent Rights and Tonsorial Tutelage," Montana Law Review 32 (1971): 299-300.

4. Ibid., p. 300.

5. Tinker v. Des Moines School District, 393 U.S. 503 (1969).

6. Ibid.

7. Daniel A. Rezneck, "The Rights of Juveniles," The Rights of Americans, ed. Norman Dorsen (New York: Random House, 1970), p. 469. Cited hereafter as Rezneck, "Juveniles."

8. In re Winship, 397 U.S. 358, 359 (1970); In re Gault, 387 U.S. 1, 30 (1967); Kent v. U.S., 383 U.S. 541, 555 (1966).

9. Rezneck, "Juveniles," pp. 469-470.

10. Ibid., pp. 470-472.

11. See Miranda v. Arizona, 384 U.S. 436 (1966). See also Chapter VI, Police Interrogations.

12. Strouse, The Law, p. xiii.

13. Letter from Gerry Fenn to Montana Constitutional Convention Commission, November 10, 1971.

14. Letter from Gerry Fenn to Montana Constitutional Convention Commission, November 9, 1971.

15. Pierce v. Society of Sisters, 268 U.S. 510 (1924).

16. Ibid., p. 535.

17. Ibid., pp. 534-35.

18. U.S., White House Conference on Children, Report to the President (Washington D.C.: U.S. Government Printing Office, 1970), p. 351.

19. Montana, Constitutional Convention of 1889, Proceedings and Debates of the Constitutional Convention (Helena: State Publishing Co., 1921), p. 126.

20. Ibid., p. 127.

21. Ibid., p. 128.

22. Ibid., p. 268.

23. Montana, Legislative Council, The Montana Constitution, Report No. 25 (Helena, 1968), p. 15. See also, Montana, Constitutional Convention 1971-1972, Constitutional Convention Commission, Constitutional Provisions Proposed by Constitution Revision Commission Subcommittees, Montana Constitutional Convention Occassional Paper No. 7 (Helena, 1971), p. 46.

24. Ibid. For the text of the federal Thirteenth Amendment, see Appendix D.

25. The concept of cultural minority self-determination and self-government is dealt with in a subsequent report on the rights of Indians.

26. Massachusetts Body of Liberties, December 10, 1641, Section 1. Richard L. Perry, Sources of Our Liberties (Rahway: Quinn and Boden Co., Inc., 1959), p. 148.

27. The Missoulian, November 23, 1971, p. 1.

28. Pauli Murray, "The Rights of Women," The Rights of Americans, ed. Norman Dorsen. (New York: Random House, 1970), p. 532.

29. Ibid., p. 539.

30. Billings Gazette, November 17, 1971, p. 2.

31. Illinois, Constitutional Convention of 1970, Synopsis: Bill of Rights (Springfield, 1970), Section 22.

32. Philip C. Schrag, "The Rights of Consumers," The Rights of Americans, ed. Norman Dorsen (New York: Random House, 1971), p. 128 makes this point. Cited hereafter as Schrag, "Consumer."

33. Ibid., p. 131.

34. Council of State Governments, Consumer Protection in the States (Lexington: Council of State Governments, 1970), pp. 8-9. Cited hereafter as CSG, Consumer Protection.

35. Ibid., pp. 9-11.

36. Schrag, "Consumers," p. 134.

37. CSG, Consumer Protection, p. 7.

38. See, generally, John Kenneth Galbraith, The New Industrial State (Boston: Houghton, Mifflin, 1967).

39. CSG, Consumer Protection, p. 7.

40. Schrag, "Consumers," p. 134.

41. Cited from Ibid., p. 135.

42. Harry Kalven, Jr. and Maurice Rosenfield, "The Contemporary Function of the Class Action Suit," University of Chicago Law Review 8 (1940-41): 686.

43. Laird C. Kirkpatrick, "Consumer Class Litigation," Oregon Law Review 50 (Fall, 1969): 21. Cited hereafter as Kirkpatrick, "Class Litigation."

44. Ibid.

45. Ibid.

46. Joseph Story, Equity Pleadings (Boston: Little Brown and Co., 1892), Sec. 97 at p. 102.

47. New York was one of the first states to adopt the Field Code. See New York Laws 1849, Ch. 438, Sec. 119.

48. Kirkpatrick, "Class Litigation," p. 23.

49. Federal Rules of Civil Procedure 23, 1 F.R.D. XCII (1940).

50. State ex rel. Anaconda Aluminum Company v. District Court, Order No. 12148.

51. Kirkpatrick, "Class Litigation," notes 19 and 20, p. 24.

52. According to one commentator, this concept amounts to a plain denial of the Field Code requirement of only a common interest among class members, not that they satisfy the compulsory joinder test of unity of interest. Most courts recognize the scope of class actions extends beyond that of compulsory joinder. Kirkpatrick, "Class Litigation," p. 26.

53. The above-discussed Montana Supreme Court decision allowed a class suit for monetary damages. In addition, the law is fairly clear that in the case of a class action for monetary damages, it may be maintained even if there are several claims brought by class members.

54. This concept is used to insure that there is an equitable division of the fund among the claimants. One suing argues that there is only a limited amount of resources available to pay the claims and that to permit separate suits runs the risk of inequitable claim payment.

55. Kirkpatrick, "Class Litigation," p. 34.

56. Hansberry v. Lee, 311 U.S. 32 (1940).

57. Ibid., pp. 40-42.

58. Mullare v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

59. Kirkpatrick, "Class Litigation," p. 40.

60. CSG, Consumer Protection, p. 29.

CHAPTER XI

CONTEMPORARY CONCERNS AND THE BILL OF RIGHTS

This chapter explores briefly two broad contemporary concerns and some of their rights issues. The first essay discusses the procedural rights of persons with low income who are involved in various proceedings. The essay also deals with recipients of social services--particularly the necessities of life. The second essay discusses various rights issues in the area of population growth limitation.

LOW-INCOME PERSONS AND THE BILL OF RIGHTS

Procedural Rights and the Low-Income Person

An example of the effort to establish fair procedure is in the area of the procedural rights of persons of low income. The federal government, especially the Supreme Court, in the last few years has recognized that an element of fairness is missing unless consideration is given to an accused's ability to pay. A system of justice which made no effort to take this ability into account quickly would be subject to the charge that it administered a class-oriented justice, that it administered justice only to those who could afford to pay the bill.

One of the earliest Supreme Court decisions in this area dealt with an Illinois statute giving persons convicted in criminal trials a right of review. Ordinarily, a stenographic transcript of the proceedings is necessary in order to adequately prepare the necessary legal documents for such review. Under the Illinois law, such transcripts were provided free of charge only to indigents sentenced to death. Appellants contended this statute denied adequate appellate review to the poor and thereby violated the Fourteenth Amendment. In agreeing with them, the Court noted that "providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to this goal."[1]

Citing the Magna Carta's prohibition against the sale or denial of justice, the Court continued:

> In this tradition, our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons

> and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system--all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."[2]
>
> Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances amount to meaningless promises to the poor. In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.[3]

One of the court's more famous decisions in this area was handed down in 1963.[4] In this case, a Florida statute permitting appointment of counsel for indigents in capital cases only was stricken down under the Sixth Amendment right of counsel. The court in incorporating the Sixth Amendment into the Fourteenth did not specifically hold that the failure to provide counsel for indigents would be an invidious discrimination against those of low income; however, the effect of the decision was:

> [T]he right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment.[5]

The court also noted:

> [Although] the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in

> some countries. . .it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[6]

Since then, the right of counsel has been extended by the court to cover a number of other stages and types of proceedings involving low-income persons.[7] In addition, federal statutory and state constitutional and statutory activity in this area is not difficult to find. The federal Bail Reform Act of 1966, for example, is designed to facilitate pre-trial release for those who could not afford paying for their release. In addition, the Georgia Constitution [Art. I, Para. 10] provides that a defendant does not have to pay costs until after final conviction: "No person shall be compelled to pay costs except after conviction on final trial."

The Revised Codes of Montana, 1947, Section 93-8625, provide that a low-income person can sue and defend in any state court without costs:

> Any person may commence and prosecute or defend an action in any of the courts of this state who will file an affidavit stating that he has a good cause of action or defense, that he is unable to pay the costs, or procure security to secure the same; then it is hereby made the duty of the officers of the courts to issue all writs and serve the same, and perform all services in the action, without demanding or receiving their fees in advance.

This provision was enacted in 1869 and was amended in 1971 to include defending without costs.[8]

A broad constitutional alternative would be an announcement that no persons should be denied the equal protection of the laws and the elemental rights of substantive or procedural due process because of income status. There is a state constitutional precedent for such a provision. As noted by the U.S. Supreme Court in 1955, the Illinois Constitution of 1818 [Art. VIII, Sec. 12] contained a provision guaranteeing that every state resident "ought to obtain right and justice

freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws [emphasis added]."[9]

Such a provision would be a guarantee at the level of fundamental law that the system of judicial procedure should not operate in any of its phases to the detriment of those who are unable to pay. It would reflect the above-mentioned 1955 court opinion, which said: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[10]

The New Property and Public Assistance Recipients' Rights

> The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality. --Charles A. Reich

A spate of material has been written about a new kind of property which is replacing to some extent traditional forms of wealth. Where traditional wealth was held apart as private property, this new property depends for its existence on a certain kind of relationship to government. For Charles Reich, who coined the term in 1964, the new property consists of numerous forms of wealth which emanate from the state: franchises, subsidies, occupational licenses, government jobs, government contracts and welfare benefits. This government largess has grown to the point where "hardly any citizen leads his life without at least partial dependence on wealth flowing through the giant government syphon."[11]

The same commentator writes that this growth of new property "is having profound consequences. It affects the underpinnings of individualism and independence. It influences the workings of the Bill of Rights."[12]

In general, these new forms of property are not protected by the legal safeguards that traditionally safeguard property rights. That is, they are nonalienable, are subject to expropriation without compensation and may be burdened with conditions unrelated to the purpose or function of the particular item of wealth.[13] Reich argues that it is essential these forms of government largess be considered a form of

property rather than mere privilege. As he puts it: "The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be vested."[14]

If it is true, as one commentator has said, that Reich invokes the term property for new government largess "not out of love of labels to be sure, but out of longing to induce [an] emotive response from the judges," perhaps it might be of doubtful value to consider some forms of government largess in terms of property.[15] Perhaps they should be selectively accorded the status of a right; this is especially the case if the legal understandings of property remains narrow, short of some notion of propriety (see Chapter VIII). Perhaps their guarantee as rights is the only way to immunize "the person as a sacrosanct object of democratic concern. . . from total dependence upon the evolving government-business Leviathan."[16] And it is more than just plausible that if certain forms of government largess were to be accorded the status of rights, the first such form to be so guaranteed would be the right to the necessities of life.

What follows is a brief exploration of the type of new property--the public assistance grant for the necessities of life and the person with inadequate income who claims it--with a view to clarifying some of the procedural and substantive civil liberties issues surrounding access to governmentally dispensed necessities.

Public Assistance

> In very simple terms public welfare policies involve the acceptance by the society at large of the responsibility to provide for the basic needs of persons who are unable, for one reason or another to provide for themselves.[17]

This idea that the public wealth ought to provide the necessities of life to those in need has long been a part of the social customs and law of most societies. It has been a part of Anglo-American common law for several centuries.[18] Blackstone, in his Commentaries, argued that it was the law which furnished what he termed a right to the necessities of life:

> The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything

> necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor. . . . [emphasis added].[19]

Blackstone also called the provision of the necessities of life "humane" and "dictated by the principles of society."[20]

The efforts at various forms of public assistance in England and the United States have been greatly influenced by the sixteenth century Parliamentary recognition of the responsibility of the local governments to raise funds for poor relief and the later Elizabethan Poor Law which established the manner in which the governmental responsibility was to be carried out.

Varying programs and degrees of commitment have characterized the American effort to provide public assistance. The early programs were generally the work of town and county governments; the Northwest Territory statutes of 1790 announced the principle of local responsibility for poor relief. Most of the state enactments during this time were delegations of responsibility for public assistance to local units of government. This reliance on local government continually declined until the mid-1930s, when the federal government moved into the field on the heels of a national economic catastrophe. During this time, state involvement in public assistance efforts had steadily increased.[21] In fact, Montana was one of the first states to enact legislation to aid the elderly in 1923.

With the passage of the Social Security Act of 1935, the pattern of the existing state programs was reflected in federal law. This act set federally enforced minimum standards for public assistance programs. Although the relative size of federal expenditure in the area increased significantly, the main responsibility for public assistance still remained with the states. States still possessed a good deal of discretion in setting up and operating such programs.[22]

In recent years, attention has been focused on this level of state discretion and two main rights areas: the standards of procedural fairness which should be followed in cases involving recipients and the substantive right (or, at least, the presumption of entitlement) possessed by those who meet the statutory requirements of the Social Security Act.

Due Process in the Administration of Public Assistance

In 1965, Charles Reich wrote:

> [T]he time has come for lawyers to take a major interest in social welfare, and for the welfare profession to concern itself with the rapidly growing relevance of law. . . . These issues [of individual rights and social welfare] will lie quiet no longer; they urgently demand our attention.[23]

In the same year, Reich's words turned out to be prophetic and what one commentator has called an era of struggle over the legal rights of public assistance recipients was begun.[24] Reich listed a number of rights areas which have since become staple fare in constitutional law. For example, some welfare regulations were drawn in a way that imposed a standard of moral behavior on recipients. In order to enforce the most famous of these, the "substitute father rule," midnight raids were made to determine whether there was a man in the home of a recipient mother. If so, she was refused further aid. In other states, various regulations operated to the same point. Some states excluded children whose mother worked fulltime, even though her salary was less than the state Aid to Families with Dependent Children level; another state excluded children of mothers who were able to work, but could not find jobs. Other states required the mother to submit to a psychiatric examination at the demand of the welfare caseworker or lose aid; excluded children who were suspended from school; excluded children who went to college instead of vocational school; excluded children whose mother was under 18 or refused to file criminal support charges against the deserting father, and on and on.[25]

In 1968, the U.S. Supreme Court ruled Alabama's "substitute father" rule unconstitutional. The court held that a state could not deny welfare benefits to a child on the grounds that his mother was engaged in extra-marital sexual relations. The court said that under the Social Security Act, "destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father."[26]

> The court also noted that insofar as Alabama's substitute father regulation (which has no relation to the need of the dependent child) is based on the State's asserted interest in discouraging illicit sexual behavior and

> illegitimacy it plainly conflicts with federal law and practice.[27]

The profound impact of this type of ruling can be seen in the fact that this one decision--affecting persons in nineteen states and the District of Columbia--opened the welfare rolls to more than half a million children previously excluded. In addition, the court's reasoning could have further impact. In attempting to clarify the definition of dependent children, the court noted that "Alabama has breached its federally imposed obligation to furnish 'aid to families with dependent children. . .with reasonable promptness to all eligible individuals' [emphasis added]."[28] This indicates that the federal definitions in the Social Security Act do not merely operate to set limits on who can receive aid; rather, the states must include everyone whom Congress intended to include within the federal definitions and conditions.[29] With such a broad interpretation of the federal act, there is a good chance that all narrow rules found in state programs may violate the Social Security Act.[30]

Another area of welfare rights activity centers around the problem of recipient dependency on agency discretion. While a recipient may fall within the legally defined categories for receipt of aid, he may still be denied aid in various ways. Perhaps the biggest advance in this area came about as a result of two companion cases decided by the U.S. Supreme Court in 1970. These two cases, Goldberg v. Kelly and Wheeler v. Montgomery, contain compelling arguments on the due process rights of recipients in the face of administrative arbitrariness.[31]

In the two cases, the court squarely faced the question of whether termination of public assistance benefits required a prior hearing. The procedure the agency followed permitted a hearing after termination. The court, upholding the lower court decision, stated that since public assistance benefits provide the "means to obtain food, clothing, housing, and medical care," the termination of aid "pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." The court continued:

> Since he [the recipient] lacks independent resources, his situation becomes immediately desperate. This need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

> Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.[32]

The respondent in the case did not contest the rights issues but argued that not granting a pre-trial evidentiary hearing conserved fiscal and administrative resources. The court replied that such interests did not override the primary concern of public assistance programs: to get benefits to all those statutorily entitled.[33] Justice Black's dissent, and those of Chief Justice Burger and Justice Stewart in the companion case, sharpen some of the underlying contentions.[34]

Another concern in the area of recipient rights is the state and local character of the public assistance system. One aspect of this quality of the program was the residency requirement. Most states had such requirements when the court ruled in Shapiro v. Thompson that such requirements were a denial of the Fourteenth Amendment's equal protection of the laws clause and the due process clause of the Fifth Amendment.[35] Again, in this case, the opinions of the court provide interesting background discussion of issues of public assistance rights.

In general, there has been a move to preclude public assistance agencies from denying benefits to those entitled to them by

requiring the agencies to follow some form of due process prior to such termination. Courts also have gradually revised the long-dormant substantive aspect of the due process protection and afforded it to those who are arbitrarily denied the necessities of life. Substantive due process--traditionally used by courts to protect railroads, corporations and other business interests by invalidating state laws guaranteeing the health, safety and welfare of citizens--has been turned around from its early twentieth century application. It now protects personal rights as opposed to corporate rights; one of the liberties it protects is the freedom from arbitrary denial of the rights attendant to "a specialized type of property presenting distinct problems in our economic system:" the necessities of life.[36] A possible constitutional alternative on this point would state that persons are entitled to public assistance as provided by law and that their arbitrary termination without prior evidentiary hearing is a denial of due process of law.

The Substantive Right to the Necessities of Life

One commentator has written that the early public assistance laws

> reflected the sentiment that poverty is a personal disgrace caused by individual laziness, moral weakness, or other individual or personal shortcomings. This underlying notion still influences some welfare provisions and the outlook of many toward public welfare.[37]

Increasingly in recent years, this attitude has been changing to the point where it is written:

> No unflattering portrait of the human psyche--as beset with envy and spite--is necessary to the belief that relative deprivation can be a great evil, especially where the inequalities are neither marginal in significance nor randomly distributed. One need believe only that a socially assigned position of noticeably inferior command over resources and influence in gravely prejudicial to one's chances for a decent life. . . .[38]

That is, the recipient no longer is viewed as the evil; rather, the condition of life to which an affluent society can assign

certain people--relative disparity--is looked on as the evil.[39]

In deciding the above-discussed Goldberg case, the court majority said:

> It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced."[40]

This is only one example of how the Supreme Court has joined the current despair over the older notions of property and, as one commentator has noted, "has begun to structure [property's] new matrix of rights not upon the old formula but upon the dignity of the human person [emphasis added]."[41] This line of reasoning suggests a substantive right to the necessities of life. As noted earlier, the new forms of property do not lend themselves to protection if they are considered as gratuity or charity. Reich, while stating that growth of governmental power in the dispensing of property must be kept within bounds, adds:

> [T]here must be a zone of privacy for each individual beyond which neither government nor private power can push--a hiding place from the all-pervasive system of regulation and control. Finally, it must be recognized that we are becoming a society based upon

> relationship and status--status deriving primarily from sources of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality.
>
> Eventually those forms of largess which are closely linked to status must be deemed to be held as of right. . . .The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual, such as technological change, variations in demand for goods, depressions, or wars. The aim of these benefits is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and a community. . . .[42]

The Bill of Rights Committee of the 1970 Illinois Constitutional Convention considered a statement related to Reich's point. The committee, on a split vote, recommended the following provision: "It shall be the public policy of the state that all persons shall have adequate nourishment, housing, medical care and other needs of human life and dignity."[43] The committee's rationale in proposing the provision is brief and somewhat curious:

> This provision is expressive of the basic needs and aspirations of the people of the state. It creates no enforceable obligation or private right, and it imposes no limitation on the powers of government. It is purely hortatory, a "constitutional sermon." Like a preamble, such a provision is not an operative part of the Constitution. It is included to serve a teaching purpose, to state an ideal or principle to guide the conduct of government and individual citizens.[44]

The reasoning is curious because in the above-cited Goldberg decision, the court based its decision on a clause in the Preamble to the U.S. Constitution.[45] This would indicate that such a provision might not be inoperative.

In any case, the committee continued that there apparently was no precedent for such a provision and that the minority opposing it believed the state's only obligation was to provide opportunities for attaining basic needs, not the needs themselves.

Another type of proposal for consideration is one which does create enforceable personal rights and obligations on the part of government, or at least sets a direction for government in a manner similar to other constitutional provisions. One example of such an alternative is a statement that health and other necessities are basic human rights that should be guaranteed to all citizens of the state; a statement also could be added binding the government to enact laws enabling citizens to secure such services without regard to distinctions such as the ability to pay. Another possibility would be a statement guaranteeing to all citizens the right to the necessities of life. Such a provision could announce that access to the necessities is a matter of public policy, could mandate the legislature to enact laws to this end and/or could stipulate privately enforceable rights to facilitate obtaining such assistance.

Whatever may be said of the substantive right to the necessities of life, it is clear that such payments as public assistance benefits no longer can be considered mere privileges. The U.S. Supreme Court said as much in Goldberg v. Kelly:

> [Public assistance] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a privilege and not a right [emphasis added].[46]

A constitutional alternative that speaks to this point would require the state to administer public assistance programs to the full extent of statutory entitlement.

POPULATION CONTROL AND THE BILL OF RIGHTS

Infinite Growth on a Finite Planet

The cover of a now-famous book, first printed in 1968, bore the following words: "while you are reading these words four people will have died from starvation. Most of them children." Also printed on that cover is the statement, "the population bomb keeps ticking." As a result of the work of Dr. Paul Ehrlich and others, the present problem of over-population has been given more of the attention it demands.[47] It has been written that "nearly every major economic or social problem today . . . can be shown to have a causal link with the unprecedented increase in human numbers which has gone unchecked since the Industrial Revolution."[48]

Until recently, it was casually assumed that the core of the problem of over-population could be credited to the developing nations--Africa, South America, Latin America and Asia. However, the population problem is also of magnitude in the United States. It is true that

> although the contribution of the developing regions to total world population growth significantly exceeds that of the developed regions, because of vastly greater rates of production and consumption the United States and other nations can be viewed as at least equally culpable contributors to problems associated with the population explosion.[49]

Increasingly, pressure has been brought at all levels of government in an effort to deal with the steady growth of population on a finite planet with finite resources. This essay outlines the legal approach to this biological imperative and concentrates on its interaction with various conceptions of personal rights.

The dimensions of the problem perhaps can best be seen in the following brief overview. The Earth, now and for many years to come the only source of men's needs, is a finite planet. That is, its capacities to satisfy the demands of an increasing population have a boundary. Since no nation, developed or developing, has stopped growing--has a zero growth rate--all nations are continually advancing toward (and some may have crossed over) that boundary. In other words, population growth, at whatever rate, is an infinite proposition on a finite planet. It should be noted that trends in a growth

rate cannot be confused with a growth rate of absolute zero. For example, during the Depression, the growth rate in the United States fell to one-half of 1 percent. But even with this low growth rate, the population kept growing; it has not stopped growing. The United States growth rate is currently at the seemingly low rate of 1 percent.

Of course, the problem in the developing countries is much worse, and may even be out of hand. Changes in the social structure in the United States, which helped to reduce (not eliminate) the growth rate, have not occurred in these nations. Their birth rate remains high. At the same time, the export of Western technology--especially antibiotics, insecticides, low cost sanitation, etc.--has increased the average life expectancy in these nations and thereby has reduced the mortality rate. It is this interplay between birth rate and death rate which is capable of producing the phenomenal growth in population which the developing nations are experiencing. Only if the birth rate and the death rate were equal would there be no growth.

Throughout most of history, population growth was very slow. The birth rate--the fertility rate--was fairly high but the new growth in population was checked by the incidence of war, famine and disease. That is, periodically high rates of mortality kept the absolute size of the population in check. High mortality rates no longer are acceptable in the public mind as solutions for population control. Given the current growth rates in population and the agreement that the mortality rate should not be increased by one means or another, the heart of the problem seems to lie in the control of the birth rate.[50]

If fertility rate is to be concentrated on as the core of the problem, it should be rembered that even a slight growth rate--that is, even a birth rate that is only slightly greater than the mortality rate--can produce in a very short time pheonmenal changes in the absolute size of a population. For example, the current growth rate of the United States, cited above as 1 percent, only seems low. When this growth rate is applied to the current United States population of 200 million, only slightly more than thirty years will be required to produce another 100 million people. In 1915, the population of the United States reached 100 million; the nation had fifty-five years to accommodate its next 100 million. At the current growth rate, only thirty years is available to accommodate the third 100 million. Adding to this the current unyielding problems in cities with overcrowding, solid waste disposal, air and water pollution, traffic congestion, etc., the prospect becomes alarming.[51]

One other consideration deserves mention. It has often been said that the United States, with its high standard of living, has only about 7 percent of the world's population, yet consumes in excess of 50 percent of the world's resources.

The primary use of the resources is concentrated among the white middle class sector of the population. It is among this burgeoning class of highly consumptive individuals that the control of population growth is most pressing. Admittedly, the growth rate in this sector of the population is slightly lower than that of the lower income and the non-white sectors; however, that is not the point. The more affluent groups consume more than the lower income groups--cars, TV sets, applicance and a stunning array of gadgets. Thus, it requires a greater portion of the finite resources of the planet to sustain this group of persons who constitute history's most materially comfortable group. Ehrlich, speaking of this highly consumptive class, has written in strong terms:

> [The middle class] produced the bulk of our demand for power, both by direct use and by creating the power needs of industry (it takes power to build cars and appliances as well as run them). Smog-producing coal-fired plants and potentially deadly nuclear power plants are not being built helter-skelter to meet the power demands of ghettos. We are not eating up the world's supplies of petroleum so that the poor can richochet around the world in jet aircraft. We do not loot the underdeveloped world of its protein to feed farm animals so that people living in poverty can enjoy steaks, pork chops, and chicken.[52]

As another commentator has written:

> [F]ocusing [a population control program] on the poor may be an all too convenient excuse for ignoring the broader and more difficult task of reducing the number of children born to the far larger class of more affluent Americans.[53]

Perhaps it is one of the central ironies of history that the attainment of a degree of material comfort unknown in previous times--except to select persons at the top of society--should produce a series of dilemmas, likewise without precedent. Leaving may threads untied, it is certain that one of these dilemmas is the tension between the proposals for solution of the problem of too large a population overburdening available resources and the concept of personal liberty. For, as one commentator has written: "It has become almost axiomatic that population growth in the United States will someday

have to stop."[54] The problem that any growth rate is an infinite proposition on a finite planet means that the critical issue in population control "is not whether the number of human beings shall be limited, but how the limitation should occur."[55]

Compulsory Limitation of Population Size: Some Potential Rights Issues

Assume the government were to institute a program of compulsory limitation of family size. Certainly one of the major potential obstacles to such a program would be the concept of individual liberty contained in the bill of rights. For example, the free exercise of religion clause might be involved to protect those whose religion proscribes the use of birth control devices. A line of U.S. Supreme Court cases on this point indicates that although the state cannot regulate a person's beliefs, it can regulate actions which are believed to be detrimental to the interests of the society at large without infringing on the freedom of religion. That is precisely the point made by the court regarding the religious practice of polygamy by members of the Mormon Church.[56] The practice was outlawed by the court even though the Mormons claimed it to be a part of their religion. This decision is reflected in the wording of Montana's free exercise of religion clause [Art. III, Sec. 4], which goes so far as to term the practice of polygamy an act of "licentiousness." A Montana Supreme Court case also indicates the potential for state regulation of religious practice. The court ruled that the peyote cult--a practice long a part of the religion of certain Indian tribes--was illegal and was not protected by the free exercise of religion clause.[57]

The bar of the use of peyote in this case has since been overturned. But the rationale of that case and of others still standing--based on the not always clear distinction between religious belief and religious behavior--has been extended in a way that does not undermine early tests of this sort or those used to rule against the Mormon practice. The most recent doctrine relating to these matters is that in order to regulate certain behavior, the state must show a compelling interest in the behavior and also must show that the behavior could not be regulated without infringing the right to the free exercise of religion.[58]

Without entering the debate too far, it can be seen that the free exercise of religion clause would not necessarily limit the capacity of the state to compel the limitation of family

size. Perhaps courts would rule that an infringement of civil liberties would be the result of an unlimited growth in population and that a slight infringement at present would eliminate the need for harsher measures in the future.

Another possible conflict with a governmental program for compulsory family limitation is the recently delineated right of marital privacy. The case Griswold v. Connecticut, previously discussed in connection with the broad right of privacy and the doctrine of unenumerated rights, announced a right of marital privacy even though one is not explicit in the federal Bill of Rights.[59] In his concurring opinion in this case, Justice Goldberg announced that the right included the right "to marry, establish a home, and bring up children."[60]

Although there is no indication in the language of the court decision that such a right extends to the right to unlimited procreation, it is arguable that it does. On the other hand, one does not, according to the cases mentioned above, have the right to decide how many spouses he or she may have. It does not seem too big a step for the legislature to control the number of children as it does the number of spouses. In addition, the Griswold opinion seems to deal more with the question of unnecessary trespass into the intimate and personal aspects of the marital relationship. Does the same rationale apply to state regulations of martal practices which have an arguably profound impact on society as a whole? The question does not have an easy answer. The final question seems to be "is there a constitutionally protected right to unlimited procreation or, alternatively, can the state regulate by statute the size of the family?"

Two U.S. Supreme Court cases deal directly with compulsory birth control statues, and they indicate that compulsory control of fertility is constitutional, but only if it meets the requirements of equal protection of the laws.[61] One of these, Buck v. Bell, affirmed a state law which provided for the compulsory sterilization of persons afflicted with hereditary insanity or imbecility. In another, Skinner v. Oklahoma, the court considered a statute which provided for the compulsory sterilization of anyone who was a habitual criminal. The statute defined the habitual criminal as one who was convicted two or more times for felonies involving "moral turpitude." Since the crimes of embezzlement and tax evasion were excluded from the definition of habitual criminals, a person with two larceny convictions could be sterilized, while one with two embezzlement convictions could not be. The Supreme Court ruled that such a statute was a denial

of the equal protection of the laws. The point seems to be that a compulsory sterilization statute cannot single out certain persons while excluding others.

These two cases, read together, indicate that the compulsory regulation of fertility may stand the tests of constitutionality. That is, it is conceivable that a legitimate state effort to compel the limitation of family size would not unduly, in the court's view, infringe basic rights. Of course, this does not deal with the question of the desirability or the necessity of such compulsion. Nor does it deal with a range of options involving voluntary methods of family size restriction.

Voluntary Limitation of Population Size

There are several alternatives to compulsory family-size restriction. These include liberalizing regulations on the sale and use of contraceptives, clarifying the legality of sterilization operations and repealing restrictions on abortions. Each of these alternatives has its own peculiar set of problems, and only one of them--abortion--has become a constitutional question of magnitude.

In the early 1800s in the United States, there were no statutory prohibitions of abortions before quickening. At that time, nearly all surgical operations carried with them the risk of fatal infection. Accordingly, the country's first abortion statutes were enacted, their justification being a desire to protect the pregnant woman from hazardous surgery. In 1858, a state court in New Jersey pointed out that the statute prohibiting abortion in New Jersey was not designed to halt abortions but to protect the life and health of the mother against the then high possibility of fatal surgery.[62] At least in terms of the early statutory justifications, the situation has changed. With many authors writing of the relative safety of hospital abortions, the old rationale has been lost. This is not to say, however, that the debate has not continued; for, without a doubt, "the present controversy over abortion reform is one of the most significant issues in the United States today."[63]

The typical early abortion statute permitted abortion in only one situation--to save the life of the mother. Such statutes did not permit abortion where permanent or serious injury to the mother was likely, where there was a good chance that a physically or mentally defective child could result, where

the pregnancy was the result of incest or rape, where the woman was medically unable to use contraceptives or where a child was unwanted. Restrictive abortion laws have been challenged on the grounds that their alleged purpose in safeguarding a woman's life is not their effect. Given the thriving market in illegal abortions, a situation in which only the wealthy woman can get a reasonably safe abortion, they are said to drive women in the excluded categories into a more dangerous situation than if they were permitted a hospital abortion.[64]

Although there is a statutory and judicial trend away from such laws, the majority of states still punish as felonies all abortions not performed for the preservation of the woman's life. Since 1967, several states have passed laws, stimulated by mounting public opinion, which permit abortions when necessary to protect the life and health of the mother, when there is substantial chance of a defective baby, or if the pregnancy was the result of rape or incest. Even with these reforms, however, the public agitation for complete abolition of the statutes has not subsided. For example, one commentator has suggested that the current status of such therapeutic abortion reforms bears a close resemblance to the effect of Prohibition laws, which only decreased the quality and ready availability of liquor without abolishing it. In other words, it is alleged that such abortion laws do not and cannot stop abortions, but can only reduce the quality of those available; the illicit market in abortions still thrives.[65]

In addition, it is argued that such statutes force women who do not meet the criteria for legal abortion and who are desparate enough to risk their lives to go underground, and thus is a denial of the equal protection of the laws. That is, the effect of the laws is to force lower income women into a situation which women of status in the community will never have to face. As a result of the estimated 1.5 million illegal abortions performed annually in the United States, there were somewhere in the neighborhood of five to ten thousand deaths, mostly among the poor.

The successes or failures of the therapeutic abortion acts notwithstanding, the entire issue has been taken to the courts where the core of the issue--whether a pregnant woman, in consultation with her physician, ought to be allowed to decide for herself when a pregnancy ought to be terminated--is being decided. The other two grounds of judicial attack on the laws, overbreadth and vagueness,

will not be discussed here because they deal less with straightforward constitutional questions than the mechanics of the particular statutes.

The famous Brandeis dissent in a 1928 wiretap case where he pointed to a "right to be let alone" and a recent case recognizing "the right to be free, except in very limited circumstances, from unwanted governmental instrusions into one's privacy," are the basic constitutional directives setting the broad base for the constitutional right to an abortion.[66] Proponents of the right also argue that the reasoning which yields the right of marital privacy, as articulated in Griswold v. Connecticut, gives a woman the right to decide if she should have a child.[67]

Supplemental support for this position can be found in the recent case which held the District of Columbia abortion law void for vagueness. In this case, the court also held that the area of protected privacy "may well include the right to remove an unwanted child at least in the early stages of pregnancy." The court also encouraged the U.S. Congress to re-examine the abortion statute in light of current medical and legal conditions, and noted that it is a legal imperative that abortion services be available to ensure that all segments of the population, rich and poor, have equal access.[68]

The California Supreme Court also handed down a ruling that the right of privacy covers the right of a woman to an abortion. Citing Griswold, the court ruled that to have protection, the right need not be enumerated in the declaration of rights. In doing so, the court noted that several other rights--the right to vote,[69] the right to travel,[70] and the right to marry and procreate[71]--are examples of unalienable, protected rights not specifically enumerated in the constitution.[72]

Other examples of court decisions declaring abortion statutes unconstitutional should be noted. The Wisconsin statute was held unconstitutional on the grounds that a woman has a private choice of whether to bear an unquickened fetus.[73] Georgia's Therapeutic Abortion Law was declared unconstitutional in part. In holding that the right of privacy includes the right to terminate an unwanted pregnancy, the court noted that the right is not unlimited; for example, the state could legitimately require that a decision to terminate a pregnancy be made only after counseling or the consent of a physician.[74] Finally, a Texas court held that the right of freedom of choice in abortions is a fundamental right.[75] The U.S. Supreme Court has said that such a decision by a state court-- as to whether any right is fundamental--could

not be based on a judge's private or personal notion but must be the result of a look at the traditions and collective conscience of the society to determine whether the principle is sufficiently rooted to be declared fundamental.[76]

That the above cases are not the final word in the matter is indicated by a Louisiana decision which held constitutional a statute which indirectly permits an abortion only to save a mother's life. In this case, the court held that an abortion is, genetically and biologically, the destruction of life.[77]

A host of other arguments are offered in general to deny and support the existence of a constitutional right of abortion. But the center of the argument, given the inability of scientific authorities to agree on a definition of life which includes or excludes the fetus, seems to be the question of whether the state has a compelling and subordinating interest in the regulation of abortions and, if such interest exists, to what extent it can be pursued without infringing individual rights. This point is made in a Supreme Court ruling which held even though a governmental purpose is legitimate, it cannot be pursued in such a way that fundamental personal interests are undermined when there is an alternative means to achieve the end.[78]

In the above-cited Wisconsin case, the defense urged that the state had a compelling interest in the protection of the fetus. The court, in holding that a woman had the right to decide whether to carry a fetus, ruled that such an interest was insufficient to entail invasion of the right.[79] In other words, such interest was compelling but not subordinating. The court also noted that the state had no compelling interest in using strict abortion laws to discourage pre-marital sexual relations.[80]

According to the previously cited Griswold decision, the state clearly has no compelling interest in the regulation of the use of birth control devices and methods. The current limited understanding of at least one contraceptive device--the intra-uterine device--makes it impossible to determine whether this device prevents fertilization or prevents the fertilized ovum from attaching itself to the uterine wall.[81] If the latter is true, the device is a form of abortion.

In any case, the question arises, as posed by former Supreme Court Justice Clark:

> One of the basic values of [the right to] privacy is birth control, as evidenced by the Griswold

> decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?[82]

The depth of this dilemma can be seen in the fact that even with the best birth control methods available, there still would be an estimated 220,000 unplanned pregnancies each year. Of course, those who oppose such reform contend that the fetus has a constitutional right to be born or, at least, that the legislature has the authority to grant such a right.[83] To be sure, courts have granted certain rights to the fetus, such as the right of inheritance and the right of tortious injury sustained prior to birth.[84] Based on this precedent, some argue that a viable fetus is a person and is therefore entitled to full protection.[85]

This position is supported by at least two lower court decisions. A Connecticut court has held that life begins at conception.[86] An Ohio court also has ruled that the fetus is a person under the Ohio Constitution.[87] As one writer has noted, "the conflict, it seems, can only be resolved by the Supreme Court."[88]

Perhaps this is true, but the Constitutional Convention presents the opportunity to deal directly with the question of the right to an abortion, if the matter is felt to be of constitutional import.

Abortion, Montana Law and the Constitutional Convention

The current Montana statute covering abortion is an example of the type of statutes which prohibit abortion except in cases when it is necessary to preserve the life of the mother. The law is found in Sections 94-401 and 94-402 of the Revised Codes of Montana, 1947:

> Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.

> Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.

Section 94-401 was enacted as part of the Bannack statutes in 1866. Section 94-402 was added in 1895. The Montana law is not a therapeutic abortion statute; it does not extend the concept of legal abortion to cover physical and mental injury, rape or incest or any other attendant circumstances. And since, as noted above, even the various therapeutic abortion statutes across the country are experiencing constitutional difficulties, there is a good chance the Montana statute is unconstitutional. In any case, a look at this difficult and controversial question is perhaps in order.

One commentator, noting that the state of Washington legalized abortion with a favorable vote of 55 percent of those turning out, suggests that "perhaps other states should submit the question to the people."[89] One way such a referendum could be accomplished by the Constitutional Convention would be to place wording guaranteeing the constitutional right to decide whether to bear children on the ratification ballot segregated from the body of the proposed constitution. Such a practice is not uncommon, having been used in several states which recently submitted constitutions for ratification; it has not, however, been used on the abortion question itself.[90]

If the provision is approved, it becomes part of the state's declaration of rights; if not, it does not affect the passage or disapproval of the proposed constitution. In any case, one issue of some national significance receives popular attention and consideration. Of course, it also could be argued that the Convention should decide the matter itself. It any case, the inclusion of a decision either way on the abortion issue within the main body of the constitution for ratification, without offering it as a separate choice, could bar ratification of the entire document. Broader constitutional alternatives not fraught with the hazards of freezing into fundamental law a definitive stance one way or the other on the abortion question include: recognition of the unyielding problems of unchecked population growth; announcement of state public policy to check unlimited population growth, and a mandate to the legislature to enact legislation encouraging population limitation.

In conclusion, one commentator has said that a legal solution to the problem of over-population is not feasible, for

several reasons. Such solutions, he says, will meet opposition by large segments of the population, may run counter to the concept of individual liberty and may even be adjudged unconstitutional. Noting that social changes of some magnitude seem to be the only answer, he writes that only laws which permit the use of contraceptives and "make the necessary information and techniques available seem to have any chance for enactment."[91]

On the other hand, another commentator, with whom the former does not disagree on the need for population control, has written that the social changes necessary for voluntary limitation of population may not even be successful. Admittedly, government could encourage responsible families to limit their number of children to two or less and could remove such impediments to family limitation as restrictive abortion statutes, unclear sterilization laws and various regulations on the uses of contraceptives. Since "the time factor is uncertain, the proponents of compulsion are correct in warning that reliance on voluntary measures is a gamble." The extent of the gamble can perhaps best be seen in considering the fact that even if fertility is controlled by 1980, it will take nearly to the year 2000 for population growth to stop. That is, even if persons were limited in their childbearing to replacing themselves, the population would continue to grow, although at a declining rate, for a number of years "because all the world's mothers for the next 20 years have already been born and the numbers entering the childbearing ages are rising year by year."[92]

Thus, there is a substantial lag between the time when any form of population control is instituted and the time when it eases or at least stabilizes the pressures on resources by attaining zero population growth. In any case, the decision whether to rely on voluntary measures or to resort to some form of compulsion is a most difficult one; the sooner voluntary measures are taken, the less likely compulsion will become necessary.[93]

To be sure, any resort to compulsion will draw all branches of government into an area fraught with seemingly unyielding contradictions; it would be an essential effort to compromise individual rights with society's need to stop its growth on a finite planet. This difficulty notwithstanding, it may be a sad but true fact that "only when this compromise is found will the individual once again enjoy the environmental quality which the founders took for granted in their sparsely populated world."[94]

Thomas Malthus wrote in 1798 that "it is difficult to conceive any check to population which does not come under the description of some species of misery and vice."[95] A present-day commentator has written:

> Everyone who thinks about these matters is groping for answers to a problem that no democratic society has squarely faced before. The root question is how to reconcile long-run collective interest in limiting the growth of population with the desires of those who want to have more than two children. Uncomfortable choices will be involved if at some point society decides that it is desireable to curtail freedom to reproduce in order to preserve other freedoms or to preserve valued amenities.[96]

None of the admittedly partial solutions mentioned above meets pleasure in all quarters of society. However, the increasing pressures of an unchecked population growth on an already overtaxed planet threaten to lead the entire human race down a path whose end is the greatest of displeasures.

NOTES

1. Griffin v. Illinois, 351 U.S. 12, 16 (1956).

2. Ibid., p. 17. Citing Chambers v. Florida, 309 U.S. 227, 241 (1940). See also Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

3. Ibid., pp. 17-18.

4. Gideon v. Wainwright, 372 U.S. 355 (1963).

5. Ibid., p. 335.

6. Ibid., p. 344.

7. See, for example, Miranda v. Arizona, 384 U.S. 436 (1966); Douglas v. California, 372 U.S. 353 (1963); Mempa v. Rhey, 389 U.S. 128 (1967).

8. 1971 Laws of Montana, Ch. 71.

9. See also Illinois Const. Art. II, Sec. 19.

10. Griffin v. Illinois, 351 U.S. 12, 19 (1956). For a further discussion of this point and the right of access to the courts, see Gary S. Goodpaster, "The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts," Iowa Law Review 56 (1970): 223.

11. Charles A. Reich, "The New Property," The Yale Law Journal 73 (1964): 737. Cited hereafter as Reich, "New Property."

12. Ibid., p. 733.

13. Robert Dugan, "Standing, 'The New Property,' and the Costs of Welfare," Washington Law Review 45 (1970): 501-502. Cited hereafter as Dugan, "New Property."

14. Reich, "New Property," p. 787.

15. E. F. Roberts, 'A Eulogy for the Old Property," Maine Law Review 20 (1968): 30. Cited hereafter as Roberts, "Old Property."

16. Ibid., p. 48.

17. Richard E. Dawson and Virginia Gray, "State Welfare Policies," Politics in the American States, eds. Herbert Jacob and Kenneth N. Vines (Boston: Little, Brown and Co., 1971), p. 435. Cited hereafter as Dawson, "State Welfare Policies."

18. Ibid.

19. Sir William Blackstone, Commentaries on the Laws of England (Portland: Thomas B. Wait and Co., 1807), I: 131.

20. Ibid.

21. Dawson, "State Welfare Policies," pp. 436-438.

22. Ibid., pp. 439-443.

23. Charles A. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," The Yale Law Journal 74 (1965): 1245.

24. Edward V. Sparer, "The Right to Welfare," The Rights of Americans, ed. Norman Dorsen (New York: Random House, 1970), p. 65. Cited hereafter as Sparer, "Welfare Rights."

25. Ibid., pp. 67-68.

26. King v. Smith, 392 U.S. 309, 334 (1968).

27. Ibid., p. 310.

28. Ibid., p. 333.

29. Sparer, "Welfare Rights," p. 69.

30. Thus far, federal and state courts seem to follow this reading of the King decision. Ibid., p. 70.

31. Goldberg v. Kelly, 397 U.S. 254 (1970); Wheeler v. Montgomery, 397 U.S. 280 (1970).

32. Goldberg v. Kelly, 397 U.S. 254, 264-265 (1970).

33. Ibid., pp. 265-266.

34. Ibid., p. 271; Wheeler v. Montgomery, 397 U.S. 280 (1970), p. 282 (Burger, C.J. dissenting) and 285 (Stewart, J. dissenting).

35. Shapiro v. Thompson, 394 U.S. 618 (1968).

36. Sniadich v. Family Finance Corp., 395 U.S. 337, 340 (1969).

37. Dawson, "State Welfare Policies," p. 436.

38. Frank I. Michelman, "On Protecting the Poor Through the Fourteenth Amendment," Harvard Law Review 83 (1969): 7.

39. On this point, see, e.g. Michael Harrington, The Other American (New York: MacMillan Co., 1962).

40. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). Quoting Reich, "Individual Rights," p. 1255.

41. Roberts, "Old Property," p. 41.

42. Reich, "New Property," p. 785. For a different view on the feasibility of treating largess as a right, see Dugan, "New Property."

43. Illinois, Constitutional Convention of 1970, Bill of Rights Committee, Synopsis: Proposal No. 1 (Springfield, 1970), Sec. 25.

44. Ibid.

45. Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

46. Ibid., p. 262.

47. Dr. Paul Ehrlich, The Population Bomb (New York: Ballantine Books, 1968).

48. William M. Chamberlain, "Population Control: The Legal Approach to a Biological Imperative," California Law Review 58 (1970): 1414. Cited hereafter as Chamberlain, "Population Control."

49. Note, "Legal Analysis and Population Control: The Problem of Coercion," Harvard Law Review 84 (1971): 1866. Cited hereafter as Note, "Legal Analysis."

50. Chamberlain, "Population Control," pp. 1419-21.

51. Ibid., p. 1421.

52. Dr. Paul Ehrlich and Richard L. Harriman, How to Be a Survivor (New York: Ballantine Books, 1971), pp. 21-22.

53. Note, "Legal Analysis," pp. 1860-61.

54. Ibid., p. 1865.

55. Chamberlain, "Population Control," p. 1414.

56. Reynolds v. U.S., 98 U.S. 145 (1878).

57. State v. Big Sheep, 75 Mont. 219, 238, 243 P. 1067 (1926).

58. Sherbert v. Venner, 374 U.S. 398, 406-7 (1963).

59. Griswold v. Connecticut, 381 U.S. 479 (1965).

60. Ibid., p. 488.

61. Buck v. Bell, 274 U.S. 200 (1927) and Skinner v. Oklahoma, 316 U.S. 535 (1942).

62. State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858) and L. Lader, Abortion (1966), p. 86. Both cited from Ricky L. Welborn, "Abortion Laws: A Constitutional Right to Abortion," North Carolina Law Review 49 (1971): 487. This essay suggested the general outline of what follows. Cited hereafter as Welborn, "Constitutional Right."

63. Welborn, "Constitutional Right," p. 102.

64. Note, "Abortion Reform: History, Status and Prognosis," Case Western Law Review 21 (1969): 529.

65. Comment, "Abortion Law Reform at a Crossroads," Chicago-Kent Law Review 46 (1969): 102, 107.

66. Olmstead v. U.S., 277 U.S. 438, 471 (1928) and Stanley v. Georgia, 394 U.S. 557 (1969), respectively.

67. Griswold v. Connecticut, 381 U.S. 479 (1965).

68. U.S. v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969).

69. Carrington v. Rash, 380 U.S. 89 (1965).

70. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

71. Skinner v. Oklahoma, 316 U.S. 535 (1942).

72. People v. Belous, Cal. 2d , 458 P.2d 194, 80 Cal. Reporter 354 (1969).

73. Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970).

74. Doe v. Bolton, ____ F. Supp. ____ , Civ. No. 13676 (N.D. Ga. July 31, 1970).

75. Roe v. Wade, 314 F. Supp. 1217 (N.D. Texas 1970).

76. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

77. Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970).

78. Shelton v. Tucker, 364 U.S. 479 (1960).

79. Babbitz v. McCann, 310 Fed. Supp. 293, 301 (E.D. Wis. 1970).

80. Ibid.

81. Welborn, "Constitutional Right," p. 499.

82. Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," Loyola U.L.A. Law Review 2 (1969): 1, 9. Cited from Ibid., note 110 at p. 499.

83. R. F. Drinan, "The Inviolability of the Right to Be Born," Western Reserve Law Review 17 (1965): 465.

84. Welborn, "Constitutional Right," p. 500.

85. Note, Valparaiso University Law Review 3 (1968): 107-9.

86. Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (Sup. Ct. 1966).

87. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 334 (1949).

88. Welborn, "Constitutional Right," p. 500. For example, compare Corbey v. Edwards, ____ F. Supp. ____, Civ. No. 2665 (W.D.N.C. Feb. 1, 1971), with the Babbitz, Bolton and Belou cases cited above.

89. Ibid., p. 502.

90. The 1970 Illinois Constitutional Convention, for example, followed this practice on several other issues.

91. Clark, "A Constitutional Appraisal," p. 198.

92. Address by L. Day, Dec. 30, 1969. Cited from Chamberlain, "Population Control," p. 1424. Attaining zero population growth immediately would require an average of slightly over one child per couple. Cf. Note, "Legal Analysis," p. 1868. Such a situation, it is noted, would have a considerable social and political impact.

93. Chamberlain, "Population Control," pp. 1442-3.

94. Ibid.

95. Thomas Malthus, First Essay on Population, Reprints Economic Classics (New York: Augustus M. Kelly, 1965), p. 108. Cited from Mitchell Sikoria, Jr., "Abortion: An Environmental Convenience or a Constitutional Right," Environmental Affairs 1 (1971): 469.

96. Lawrence A. Mayer, "U.S. Population Growth: Would Fewer Be Better?" The American Population Debate, ed. Daniel Callahan (Garden City: Doubleday and Company, Inc., 1971), p. 18.

CHAPTER XII

CONCLUSION

A final word is perhaps in order. The notion that government ought to be limited by law and that civil liberties ought to be safeguarded is not new or revolutionary in any sense, nor does the protection of these essentially personal civil liberties depend upon the form of government; for as Jefferson stated, a bill of rights is "what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."[1] To the same point, it has been noted that only a tyrannical government infringes the constitutional protection of civil liberties.[2]

In addition, at least one commentator has stated that there are no scientific norms or predetermined answers in respect to the basic assumptions of written constitutions, to the principles that should be incorporated in such documents, or, even less, to the specific and concrete problems that need solution.[3] These all are matters for informed opinion and independent political judgment. What is required is not strictly legal judgment, either. As the editors of a compendium of the law of civil and political rights stated, "the law of political and civil rights is too important a matter to be left to the lawyers. Solution of the problem involved requires the combined assistance of all intellectual disciplines."[4] Other commentators have made the same point. Justice Jackson once observed, "the attitude of a society and of its organized political forces rather than its legal machinery, is the controlling force in the character of free institutions."[5]

This notion brings one full circle and sheds light on the current lack of understanding and lack of desire to protect old (and explore new) liberties of the type reflected in the federal Bill of Rights and the states' declarations. Coupling the idea that the political climate of a society is the prime insurance of liberties with the lack of contemporary public concern--duly noted by a substantial number of political scientists, sociologists, editorial writers, etc.--leaves one with a host of seemingly unyielding questions answerable only after considered reflection and judgment. Such judgment would no doubt take its cues not only from tradition, past experience and the recent trends of constitution revision, but also from the informed opinion of independent scholars.[6] Hopefully, the above provides some of the material necessary for that type of judgment.

Finally, a word of caution: In all efforts at serious political discourse, such as (at least potentially) a constitutional convention, "nothing . . . compromises the understanding of political issues and their meaningful debate . . . more seriously than the automatic thought-reactions conditioned by the beaten paths of ideologies . . . ."[7]

FOOTNOTES

1. Thomas Jefferson to James Madison, Dec. 20, 1787. Cited from Robert Rutland, The Birth of the Bill of Rights (Chapel Hill: University of North Carolina Press, 1955), p. 129.

2. Hannah Arendt, On Revolution (New York: Viking Press, 1963), p. 141. Cited hereafter as Arendt, On Revolution.

3. Paul G. Kauper, "The State Constitution: Its Nature and Purpose" reprinted in Montana, Constitutional Convention 1971-1972, Montana Constitutional Convention Commission, A Collection of Readings on State Constitutions, Their Nature and Purpose, Montana Constitutional Convention Study No. 4 (Helena, 1971), p. 125. Cited hereafter as Kauper, "State Constitution."

4. Thomas Emerson, David Haber and Norman Dorsen, Political and Civil Rights in the United States (Boston: Little, Brown and Co., 1967), p. v.

5. Quoted from H. Frank Way, Jr., Liberty in the Balance (New York: McGraw-Hill, Inc., 1967), preface.

6. Kauper, "State Constitution," p. 125.

7. Arendt, On Revolution, p. 225.

APPENDIX A

MONTANA CONSTITUTION: PREAMBLE AND DECLARATION OF RIGHTS

PREAMBLE

We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do, in accordance with the provisions of the enabling act of congress, approved the twenty-second of February, A. D. 1889, ordain and establish this constitution.

ARTICLE III

A DECLARATION OF RIGHTS OF THE PEOPLE OF THE STATE OF MONTANA

Section 1. All political power is vested in and derived from the people; all government of right originates with the people; is founded upon their will only, and is instituted solely for the good of the whole.

Section 2. The people of the state have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state, and to alter and abolish their constitution and form of government, whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States.

Section 3. All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.

Section 4. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed, and no person shall be denied any civil or political right or privilege on account of his opinions concerning religion, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, by bigamous or polygamous marriage, or otherwise, or justify practices inconsistent with the good order, peace, or safety of the state, or opposed to the civil authority

thereof, or of the United States. No person shall be required to attend any place of worship or support any ministry, religious sect, or denomination, against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.

Section 5. All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Section 6. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay.

Section 7. The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing.

Section 8. Criminal offenses of which justice's courts and municipal and other courts, inferior to the district courts, have jurisdiction, shall, in all courts inferior to the district court, be prosecuted by complaint. All criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court. A grand jury shall consist of seven persons, of whom five must concur to find an indictment.

A grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary, and shall so order.

Section 9. Treason against the state shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his confession in open court; no person shall be attainted of treason or felony by the legislative assembly; no conviction shall work corruption of blood or forfeiture of estate; the estates of persons who may destroy their own lives shall descend or vest as in cases of natural death.

Section 10. No law shall be passed impairing the freedom of speech; every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

Section 11. No ex post facto law nor law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislative assembly.

Section 12. No person shall be imprisoned for debt except in the manner prescribed by law, upon refusal to deliver up his estate for the benefit of his creditors, or in cases of tort, where there is strong presumption of fraud.

Section 13. The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

Section 14. Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.

Section 15. The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

Section 16. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public

trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

Section 17. No person shall be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary in order to take his deposition. If he can give security for his appearance at the time of trial, he shall be discharged upon giving the same; if he cannot give security, his deposition shall be taken in the manner prescribed by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of the time and place thereof. Any deposition authorized by this section may be received as evidence on the trial, if the witness shall be dead or absent from the state.

Section 18. No person shall be compelled to testify against himself, in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense.

Section 19. All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

Section 20. Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.

Section 21. The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion, or invasion, the public safety require it.

Section 22. The military shall always be in strict subordination to the civil power; no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, except in the manner prescribed by law.

Section 23. The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to a felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number propovided by law. A jury in a justice's court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six persons. In all civil actions and in all

criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein.

Section 24. Laws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death.

Section 25. Aliens and denizens shall have the same right as citizens to acquire, purchase, possess, enjoy, convey, transmit, and inherit mines and mining property, and milling, reduction, concentrating, and other works, and real property necessary for or connected with the business of mining and treating ores and minerals: provided, that nothing herein contained shall be construed to infringe upon the authority of the United States to provide for the sale or disposition of its mineral and other public lands.

Section 26. The people shall have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances by petition or remonstrance.

Section 27. No person shall be deprived of life, liberty, or property without due process of law.

Section 28. There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted.

Section 29. The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Section 30. The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.

Section 31. No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislative assembly, or of the governor when the legislative assembly cannot be convened.

ARTICLE IV

DISTRIBUTION OF POWERS

Section 1. The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

1884 MONTANA CONSTITUTION: PREAMBLE AND DECLARATION OF RIGHTS

PREAMBLE

The object of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights and the blessings of life; and whenever these great objects are not obtained, the people have a right to alter or change their form of government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenant with each citizen and each citizen with the whole people, that all should be governed by certain laws for the common good.

It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well for an impartial interpretation and a faithful execution of them, that every man may at all times find his safety in them. We, therefore, the people of Montana, acknowledging with grateful hearts the goodness of the Great Legislator of the Universe, in affording us, in the course of His Providence, an opportunity, deliberately and peaceably, without fraud, violence or intimidation, of entering into an original, explicit, and solemn compact with each other, and of forming a constitution of civil government for ourselves and our posterity; and devoutly imploring His direction in so grand and interesting a design, do agree upon, ordain, and establish the following declaration of rights add form of government as the Constitution of the State of Montana.

ARTICLE 1

A DECLARATION OF THE RIGHTS OF THE PEOPLE OF THE STATE OF MONTANA

In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare:

Section 1. That all political power is vested in and derived from the people; that all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

Section 2. That the people of this State have the sole and exclusive right of governing themselves, as a free, sovereign, and independent State, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States.

Section 3. That all persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness.

Section 4. That the free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be gurranteed: and no person shall be denied any civil or pclitical rights, privilege or capacity, on account of his opinions concerning religion, but the liberty of conscience hereby secured, shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, by bigamous or polygamous marriage, or otherwise, or justify practices inconsistent with the good order, peace, or safety of the State, or opposed to the civil authority thereof, or of the United States. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.

Section 5. That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free axercise of the right of suffrage.

Section 6. That courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice should be administered without sale, denial or, delay.

Section 7. That the people shall be secure in their person, papers, homes, and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing, shall issue, without describing the place to be searched or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation, reduced to writing.

Section 8. That until otherwise provided by law, no person shall for felony be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or navel forces, or in the militia when in actual service in the time of war or public danger. In all other cases, offenses shall be prosecuted criminally be indictment or information.

Section 9. That treason against the State shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; that no person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or on his confession in open court; that no person shall be attainted of treason or felony by the Legislative Assembly; that no conviction shall work corruption of blood or forfeiture of estate; that the estates of persons who may destroy their own lives shall descend or vest as in cases of natural death.

Section 10. That no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

Section 11. That no ex-post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises, or immunities shall be passed by the Legislative Assembly.

Section 12. That no person shall be imprisoned for debt except in such manner as may be prescribed by law, upon refusal to deliver up his estate for the benefit of his creditors, or, in cases of tort, where there is strong presumption of fraud.

Section 13. That the right of any person to keep and bear arms in defense of his own home, person and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be construed to justify the practise of carrying concealed weapons.

Section 14. That private property shall not be taken for private use, unless by consent of the owner, except for private ways of necessity, and except for reservoirs drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes.

Section 15. That private property shall not be taken or damanged for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, is such manner as may be prescribed by law; and until the same shall be paid to the owner or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Section 16. That in criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Section 17. That no person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. If he can give secutiry he shall be discharged; if he can not give security, his deposition shall be taken by some Judge of the Supreme, district, or county court, at the earliest time he can attend, at some convenient place appointed by him for that purpose, of which time and place the accused and the attorney prosecuting for the people shall have reasonable notice. The accused shall have the right to appear in person and by counsel. If he have no counsel, the judge shall assign him one in that behalf only. On the completion of such examination, the witness shall be discharged on his own recognizance, entered into before said judge, but such deposition shall not be used, if in the opinion of the court the personal attendance of the witness might be procured by the prosecution, or is procured by the accused. No exception shall be taken to such deposition as to matters of form.

Section 18. That no person shall be compelled to testify against himself in a criminal case, nor shall any person be twice put in jeopardy for the same offense.

Section 19. That all persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.

Section 20. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 21. That the privilege of the writ of habeas corpus shall never be suspended, unless in case of rebellion or invasion the public safety require it.

Section 22. That the military shall always be in strict subordination to the civil power; that no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in the manner prescribed by law.

Section 23. The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases not of the grade of felony, may consist of less than twelve men, as may be prescribed by law. And the Legislative Assembly may provide by law that, in civil cases, any number, not less than two-thirds of a jury, may find a verdict, and that such verdict, when so found, shall be taken and held to have the same force and effect as if all of such jury concurred therein. Hereafter, a grand jury shall consist of twelve men, any nine of whom, concurring, may find an indictment; Provided, The Legislative Assembly may change, regulate, or abolish the grand jury system.

Section 24. That the people have the right peaceable to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances, by petition or remonstrance.

Section 25. That no person shall be deprived of life, liberty, or property without due process of law.

Section 26. That there shall never be in this State either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted.

Section 27. The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Section 28. The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.

ARTICLE III

DISTRIBUTION OF POWERS

Section 1. The powers of the government of this State are divided into three distinct departments: The Legislative, Executive, and Judicial; and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted.

THE VIRGINIA DECLARATION OF RIGHTS
(Adopted June 12, 1776)*

A DECLARATION of RIGHTS made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government.

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amendable to them.

3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community, of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration; and that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and, that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they

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*Robert Rutland, The Birth of the Bill of Rights: 1776-1791 (Chapel Hill: University of North Carolina Press, 1955), pp. 231-233.

should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the publick good.

7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unamious consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

10. That general warrants, whereby any officer or messenger may be commanded to search suspected placed without evidence of a fact committed, or to seize any person or persons not name, or whose offence is not particularly described and supported by evidence, are grevious and oppressive, and ought not to be granted.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.

13. That a well regulated miltia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

14. That the people have a right to uniform government; and tnerefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

15. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

APPENDIX D

FEDERAL BILL OF RIGHTS AND THE THIRTEENTH AND FOURTEENTH AMENDMENTS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(The first ten Amendments were adopted in 1791.)

AMENDMENT XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1865.]

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, exluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. [Adopted in 1868.]

APPENDIX E

SELECTED RIGHTS PROVISIONS

This appendix reflects the variety of wordings other states have in their declarations of rights. Generally speaking, the topics below with the most provisions have the greatest variety of statements. The appendix also suggests alternative subjects and wording that might be considered for inclusion in the declaration of rights.

PREAMBLE AND POLITICAL THEORY PROVISIONS

Preamble

Montana Const. We, the people of the state of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do, in accordance with the provisions of the enabling act of Congress, approved the twenty-second of February, A.D. 1889, ordain and establish this constitution.

Indiana Const. To the end that justice be established, public order maintained, and liberty perpetuated: We, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

Maine Const. We the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring His aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the State of Maine, and do ordain and establish the following Constitution for the government of the same.

Georgia Const. To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen, and transmit to posterity the enjoyment of liberty, we, the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution.

Origin and Purpose of Government

Montana Const. Art. III, Sec. 1. All political power is vested in and derived from the people; all government of right originates with the people; is founded upon their will only, and is instituted solely for the good of the whole.

Minnesota Const. Art. I, Sec. 1. Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform such government, whenever the public good may require it.

Alabama Const. Art. I, Sec. 35. That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

Ohio Const. Art. I, Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Vermont Const. Chap. I, Art. 6. That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them.

Georgia Const. Art. I, Para. II. Protection the duty of government. Protection to person and property is the paramount duty of government, and shall be impartial and complete.

Tennessee Const. Art. I, Sec. 2. That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

West Virginia Const. Art. III, Sec. 2. All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them.

New Hampshire Const. Part First, Art. 38. A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to justice, moderation, temperance, industry, frugality, and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government; the people ought, therefore, to have a particular regard to all those principles in the choice of their officers and representatives, and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of government.

Maryland Const. Art. 43. That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People. The Legislature may provide that land actively devoted to farm or agricultural use shall be assessed on the basis of such use and shall not be assessed as if sub-divided.

Popular Sovereignty

Montana Const. Art. III, Sec. 2. The people of the state have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state, and to alter and abolish their constitution and form of government, whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States.

Hawaii Const. Art. I, Sec. 1. All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

Connecticut Const. Art. I, Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient.

West Virginia Const. Art. III, Sec. 20. Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles.

Maryland Const. Art. 6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct: Wherefore, whenever the ends of Government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the People may, and of right ought, to reform the old, or establish a new Government; the doctrine of non-resistence against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.

Inalienable Rights

Montana Const. Art. III, Sec. 3. All persons are born equally free, and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.

Hawaii Const. Art. I, Sec. 2. All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

Connecticut Const. Art. I, Sec. 1. All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.

Oregon Const. Art. I, Sec. 20. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.

Missouri Const. Art. I, Sec. 2. That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

Virginia Const. Art. I, Sec. 1. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Puerto Rico Const. Art. II, Sec. 7. The rights of life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist . . . .

Wyoming Const. Art. I, Sec. 3. Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

Open Elections

Montana Const. Art. III, Sec. 5. All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Puerto Rico Const. Art. II, Sec. 2. The laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal sufrage and shall protect the citizen against any coercion in the exercise of the electoral franchise.

Virginia Const. Art. I, Sec. 6. That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.

North Carolina Const. Art. I, Sec. 9, 10. For redress of grievances and for amending and strengthening the laws, elections shall be often held.

All elections shall be free.

Maryland Const. Art. 7. That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose elections ought to be free and frequent; and every white male citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

Maryland Const. Art. 34. That a long continuance in the Executive Departments of power or trust is dangerous to liberty; a rotation therefore, in those departments is one of the best securities of permanent freedom.

Separation of Powers

Montana Const. Art. IV, Sec. 1. The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Kansas Const. Sec. 27, 28. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Military Provisions

Montana Const. Art. III, Sec. 22, 31. The military shall always be in strict subordination to the civil power; no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, except in the manner prescribed by law.

No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislative assembly, or of the governor when the legislative assembly cannot be convened.

Iowa Const. Art. I, Sec. 14, 15. The military shall be subordinate to the civil power. No standing army shall be kept up by the State in time of peace; and in time of war, no appropriation for a standing army shall be for a longer time than two years.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.

Alabama Const. Art. I, Sec. 27. That no standing army shall be kept up without the consent of the legislature, and, in that case, no appropriation for its support shall be made for a longer term than one year; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

Tennessee Const. Art. I, Sec. 25. That no citizen of this State, except such as are employed in the army of the United States, or militia in actual service, shall be subjected to punishment under the martial or military law. That martial law, in the sense of the unrestricted power of military officers, or others, to dispose of the persons, liberties or property of the citizen, is inconsistent with the principles of free government, and is not confided to any department of the government of this State.

Maine Const. Art. I, Sec. 14. No person shall be subject to corporal punishment under military law, except such as are employed in the army or navy, or in the militia when in actual service in time of war or public danger.

Tennessee Const. Art. I, Sec. 28. That no citizen of this State shall be compelled to bear arms, provided he will pay an equivalent, to be ascertained by law.

SUBSTANTIVE RIGHTS

Freedom of Speech and Press

Montana Const. Art. III, Sec. 10. No law shall be passed impairing the freedom of speech; every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

New Jersey Const. Art. I, Sec. 6. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Indiana Const. Art. I, Sec. 9, 10. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible.

In all prosecutions for libel, the truth of the matters alleged to be libelous may be given in justification.

Illinois Const. Art. I, Sec. 4. All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.

Arkansas Const. Art. II, Sec. 6. The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. In all criminal prosecution for libel, the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted.

Vermont Const. Chap. I, Art. 13. That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.

Right of Assembly

Montana Const. Art. III, Sec. 26. The people shall have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances by petition or remonstrance.

Puerto Rico Const. Art. II, Sec. 6. Persons may join with each other and organize freely for any lawful purpose, except in military or quasi-military organizations.

Freedom of Religion

Montana Const. Art. III, Sec. 4. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed, and no person shall be denied any civil or political right or privilege on account of his opinions concerning religion, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, by bigamous or polygamous marriage, or otherwise, or justify practices inconsistent with the good order, peace, or safety of the state, or opposed to the civil authority thereof, or of the United States. No person shall be required to attend any place of worship or support any ministry, religious sect, or denomination, against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.

New Jersey Const. Art. I, Sec. 3, 4. No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches place or, places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.

Florida Const. Art. I, Sec. 3. Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Arkansas Const. Art. II, Sec. 24. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect, or support any place of worship; or to maintain any ministry against his consent. No human authority can, in any case or manner whatsoever control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship, above any other.

Alabama Const. Art. I, Sec. 3. That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles.

South Dakota Const. Art. VI, Sec. 3. The right to worship God according to the dictates of conscience, shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state.

No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.

New Hampshire Const. Part First, Art. 6. As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established.

Right to Bear Arms

Montana Const. Art. III, Sec. 13. The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

Idaho Const. Art. I, Sec. 11. The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.

Pennsylvania Const. Art. I, Sec. 21. The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.

Tennessee Const. Art. I, Sec. 26. That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.

Hawaii Const. Art. I, Sec. 15. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

PROCEDURAL RIGHTS

Montana Const. Art. III, Sec. 16. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

Vermont Const. Chap. I, Art. 10. That in all prosecutions for criminal offenses, a person hath a right to be heard by himself and his counsel; to demand the cause and nature of his accusation; to be confronted with the witnesses; to call for evidence in his favor, and a speedy public trial by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers; provided, nevertheless, in criminal prosecutions for offenses not punishable by death, the accused, with the consent of the prosecuting officer entered of record, may in open court or by a writing signed by him and filed with the court, waive his right to a jury trial and submit the issue of his guilt to the determination and judgment of the court without a jury.

Virginia Const. Art. I, Sec. 8. That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

Hawaii Const. Art. I, Sec. 11. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the

assistance of counsel for his defense. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days.

Maryland Const. Art. 21. That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

North Carolina Const. Art. I, Sec. 23. In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

Michigan Const. Art. I, Sec. 20. In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in all courts not of record; to be informed of the nature of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; to have an appeal as a matter of right; and in courts of record, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Mississippi Const. Art. III, Sec. 25. No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both.

Puerto Rico Const. Art. II, Sec. 11. In all criminal prosecution, the accused shall enjoy the right to have a speedy and public trial, to be informed of the nature and cause of the accusation and to have a copy thereof, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, to have assistance of counsel, and to be presumed innocent.

In all prosecutions for a felony that accused shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine.

No person shall be compelled in any criminal case to be a witness against himself and the failure of the accused to testify may be neither taken into consideration nor commented upon against him.

No person shall be twice put in jeopardy of punishment for the same offense.

Before conviction every accused shall be entitled to be admitted to bail.

Incarceration prior to trial shall not exceed six months nor shall bail or fines be excessive. No person shall be imprisoned for debt.

Judicial Remedies

Montana Const. Art. III, Sec. 6. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay.

North Carolina Art. I, Sec. 18. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Puerto Rico Const. Art. II, Sec. 8. Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life.

New Hampshire Const. Part First, Art. 14. Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; comformably to the laws.

Pennsylvania Const. Art. I, Sec. 11. All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Alabama Const. Art. I, Sec. 14. That the State of Alabama shall never be made a defendant in any court of law or equity.

Arizona Const. Art. II, Sec. 31. No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person.

Initiation of Proceedings and Grand Jury

Montana Const. Art. III, Sec. 8. Criminal offenses of which justice's courts and municipal and other courts, inferior to the district courts, have jurisdiction, shall, in all courts inferior to the district court, be prosecuted by complaint. All criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such leave of the court. A grand jury shall consist of seven persons, of whom five must concur to find an indictment.

A grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary, and shall so order.

Alaska Const. Art. I, Sec. 8. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

Arizona Const. Art. II, Sec. 30. No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination.

Idaho Const. Art. I, Sec. 8. No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts

or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor.

New Mexico Const. Art. II, Sec. 14. No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a District Attorney or Attorney General or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than seventy-five resident taxpayers of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Due Process

Montana Const. Art. III, Sec. 27. No person shall be deprived of life, liberty, or property without due process of law.

Alabama Const. Art. I, Sec. 7. That no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied.

Tennessee Const. Art. I, Sec. 8. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Minnesota Const. Art. I, Sec. 2. No member of the State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the State otherwise than the punishment of crime, whereof the party shall have been duly convicted.

Puerto Rico Const. Art. II, Sec. 7. No person shall be deprived of his liberty without due process of law. No person in Puerto Rico shall be denied the equal protection of the laws.

Hawaii Const. Art. I, Sec. 4. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Illinois Const. Art. I, Sec. 2. No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Maine Const. Art. I, Sec. 6-A. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof.

Arizona Const. Art. II, Sec. 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Michigan Const. Art. I, Sec. 17. No person shall . . . be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Alaska Const. Art. I, Sec. 7. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Kentucky Const. Sec. 2. Absolute and arbitrary power denied. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

South Dakota Const. Art. VI, Sec. 2. No person shall be deprived of life, liberty or property without due process of law. The right of persons to work shall not be denied, or abridged on account of membership or non-membership in any labor union, or labor organization.

Self-Incrimination and Double Jeopardy

Montana Const. Art. III, Sec. 18. No person shall be compelled to testify against himself, in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense.

New Mexico Const. Art. II, Sec. 15. No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he is convicted.

Rhode Island Const. Art. I, Sec. 13. No man in a court of common law shall be compelled to give evidence criminating himself.

Habeas Corpus

Montana Const. Art. III, Sec. 21. The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion, or invasion, the public safety require it.

Texas Const. Art. I, Sec. 12. The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.

North Carolina Const. Art. I, Sec. 21. Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended.

Georgia Const. Art. I, Para. XI. The writ of Habeas Corpus shall not be suspended.

Alabama Const. Art. I, Sec. 17. That the privilege of the writ of habeas corpus shall not be suspended by the authorities of this state.

Puerto Rico Const. Art. II, Sec. 13. The writ of habeas corpus shall be granted without delay and free of costs. The privilege of the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of rebellion, insurrection or invasion. Only the Legislative Assembly shall have the power to suspend the privilege of the writ of habeas corpus and the laws regulating its issuance.

Florida Const. Art. I, Sec. 13. The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

Unreasonable Detention

Montana Const. Art. III, Sec. 17. No person shall be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary in order to take his deposition. If he can give security for his appearance at the time of trial, he shall be discharged upon giving the same; if

he cannot give security, his deposition shall be taken in the manner prescribed by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of the time and place thereof. Any deposition authorized by this section may be received as evidence on the trial, if the witness shall be dead or absent from the state.

Missouri Const. Art. I, Sec. 18(b). Upon a hearing and finding by the circuit court in any case wherein the accused is charged with a felony, that it is necessary to take the deposition of any witness within the state, other than defendant and spouse, in order to preserve the testimony, and on condition that the court make such orders as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant, the state may take the deposition of such witness and either party may use the same at the trial, as in civil cases, provided there has been substantial compliance with such orders. The reasonable personal and traveling expenses of defendant and his counsel shall be paid by the state or county as provided by law.

Arkansas Const. Art. II, Sec. 9. Excessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel or unusual punishment be inflicted; nor witnesses be unreasonably detained.

Bail

Montana Const. Art. III, Sec. 19. All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

Florida Const. Art. I, Sec. 14. Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

Oregon Const. Art. I, Sec. 14. Offences (sic), except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong.-

Georgia Const. Art. I, Para. VII, IX. Banishment and whipping as punishment for crime. Neither banishment beyond the limits of the State, nor whipping, as a punishment for crime, shall be allowed.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison.

Florida Const. Art. I, Sec. 17. Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Trial By Jury in Civil Cases

Montana Const. Art. III, Sec. 23. The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice's court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six persons. In all civil actions and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein.

New Hampshire Const. Part First, Art. 20. In all controversies concerning property--and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, and except in cases in which the value in controversy does not exceed five hundred dollars, and title of real estate is not concerned the parties have a right to a trial by jury and this method of procedure shall be held sacred, unless, in cases arising on the high seas and such as relates to mariners' wages the legislature shall think it necessary hereafter to alter it.

In all civil cases the right of Trial by Jury shall remain inviolate.-

North Carolina Const. Art. I, Sec. 25. Right of jury trial in civil cases. In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

New Hampshire Const. Part First, Art. 21. In order to reap the fullest advantage of the inestimable privilege of the trial by jury, great care ought to be taken, that none but qualified persons should be appointed to serve; and such ought to be fully compensated for their travel, time, and attendance.

Principles of Penal Sanction

Montana Const. Art. III, Sec. 24. Laws for the punishment of crime shall be founded on the principles of reformation and prevention, but this shall not affect the power of the legislative assembly to provide for punishing offenses by death.

New Hampshire Const. Part First, Art. 18. All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.

Alaska Const. Art. I, Sec. 12. Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

Oregon Const. Art. I, Sec. 15. Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice.-

Tennessee Const. Art. I, Sec. 13. That no person arrested and confined in jail shall be treated with unnecessary rigor.

Oregon Const. Art. I, Sec. 13. No person arrested, or confined in jail, shall be treated with unnecessary rigor.-

Rhode Island Const. Art. I, Sec. 14. Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted.

Wyoming Const. Art. I, Sec. 15, 16. The penal code shall be framed on the humane principles of reformation and prevention.

No person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for.

Tennessee Const. Art. I, Sec. 32. That the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for.

Cruel and Unusual Punishments

Montana Const. Art. III, Sec. 20. Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.

Puerto Rico Const. Art. II, Sec. 12. Neither slavery nor involuntary servitude shall exist except in the latter case as a punishment for crime after the accused has been duly convicted. Cruel and unusual punishments shall not be inflicted. Suspension of civil rights including the right to vote shall cease upon service of the term of imprisonment imposed.

No ex post facto law or bill of attainder shall be passed.

PRIVACY

Search and Seizure

Montana Const. Art. III, Sec. 7. The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing.

Florida Const. Art. I, Sec. 12. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

Missouri Const. Art. I, Sec. 15. That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, or nearly as may be; nor without probable cause, supported by written oath or affirmation.

Puerto Rico Const. Art. II, Sec. 10. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Wire-tapping is prohibited.

No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.

Evidence obtained in violation of this section shall be inadmissible in the courts.

Vermont Const. Chap I, Art. 11. That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Illinois Const. Art. I, Sec. 6. The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Washington Const. Art. I, Sec. 7. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Hawaii Const. Art. I, Sec. 5. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Maryland Const. Art. 26. That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

MISCELLANEOUS PROVISIONS

Eminent Domain

Montana Const. Art. III, Sec. 14, 15. Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.

The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

Oklahoma Const. Art. II, Sec. 24. Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

Arizona Const. Art. II, Sec. 17. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Missouri Const. Art. I, Sec. 26, 27 and 28. That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

That in such manner and under such limitations as may be provided by law, the state, or any county or city may acquire by eminent domain such property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended, and may be vested with the fee simple title thereto, or the control of the use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements made.

That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and

ditches across the lands of others for agricultural and sanity purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

Mississippi Const. Art. III, Sec. 17. Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

Puerto Rico Const. Art. II, Sec. 9. Private property shall not be taken or damaged for public use except upon payment of just compensation and in the manner provided by law. No law shall be enacted authorizing condemnation of printing presses, machinery or material devoted to publications of any kind. The building in which these objects are located may be condemned only after a judicial finding of public convenience and necessity pursuant to procedure that shall be provided by law, and may be taken before such a judicial finding only when there is placed at the disposition of the publication and adequate site in which it can be installed and continue to operate for a reasonable time.

Minnesota Const. Art. I, Sec. 13. Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

Hawaii Const. Art. I, Sec. 18. Private property shall not be taken or damaged for public use without just compensation.

Vermont Const. Chap. I., Art. 2. That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

Colorado Const. Art. II, Sec. 15. Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary

rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Oklahoma Const. Art. II, Sec. 23. No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

Arkansas Const. Art. II, Sec. 22. The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

Rights of Aliens

Montana Const. Art. III, Sec. 25. Aliens and denizens shall have the same right as citizens to acquire, purchase, possess, enjoy, convey, transmit, and inherit mines and mining property, and milling, reduction, concentrating, and other works, and real property necessary for or connected with the business of mining and treating ores and minerals: provided, that nothing herein contained shall be construed to infringe upon the authority of the United States to provide for the sale or disposition of its mineral and other public lands.

Arkansas Const. Art. II, Sec. 20. No distinction shall ever be made by law, between resident aliens and citizens, in regard to the possession, enjoyment, or descent of property.

New Mexico Const. Art. II, Sec. 22. Unless otherwise provided by law no alien, ineligible to citizenship under the laws of the United States, or corporation, copartnership or association, a majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico.

Kansas Const. Art. I, Sec. 17. No distinction shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law.

Iowa Const. Art. I, Sec. 22. Foreigners who are, or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens.

Involuntary Servitude

Montana Const. Art. III, Sec. 28. There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted.

Other states which have involuntary servitude provisions use nearly identical wording.

Freedom from Discrimination

Illinois Const. Art. I, Sec. 17, 18 and 19. All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.

All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

Puerto Rico Const. Art. II, Sec. 1. The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.

New Jersey Const. Art. I, Sec. 5. No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools because of religious principles, race, color, ancestry or national origin.

Michigan Const. Art. I, Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Pennsylvania Const. Art. I, Sec. 26. Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

Alaska Const. Art. I, Sec. 3. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, or national origin. The legislature shall impement this section.

Connecticut Const. Art. I, Sec. 20. No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.

Hawaii Const. Art. I, Sec. 12. No person shall be disqualified to serve as a juror because of sex.

North Carolina Const. Art. I, Sec. 26. No person shall be excluded from jury service on account of sex, race, color, religion, or national origin.

Debt Imprisonment

Montana Const. Art. III, Sec. 12. No person shall be imprisoned for debt except in the manner prescribed by law, upon refusal to deliver up his estate for the benefit of his creditors, or in cases of tort, where there is strong presumption of fraud.

South Dakota Const. Art. VI, Sec. 15. No person shall be imprisoned for debt arising out of or founded upon a contract.

New Jersey Const. Art. I, Sec. 13. No person shall be imprisoned for debt in any action, or on any judgment found upon contract, unless in cases of fraud; nor shall any person be imprisoned for a militia fine in time of peace.

Illinois Const. Art. I, Sec. 14. No person shall be imprisoned for debt unless he refuses to deliver up his estate for the benefit of his creditors as provided by law or unless there is a strong presumption of fraud. No person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment.

Alabama Const. Art. I, Sec. 20. That no person shall be imprisoned for debt.

Minnesota Const. Art. I, Sec. 12. No person shall be imprisoned for debt in this State, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. [Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed.]

Nevada Const. Art. I, Sec. 14. The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted; And there shall be no imprisonment for debt, except in cases of fraud, libel, or slander, and no person shall be imprisioned [imprisoned] for a Militia fine in time of Peace.

Puerto Rico Const. Art. II, Sec. 7. . . .A minimum amount of property and possessions shall be exempt from attachment as provided by law.

Ex Post Facto Laws and Bills of Attainder

Montana Const. Art. III, Sec. 11. No ex post facto law nor law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislative assembly.

Kansas Const. Sec. 20. No person shall be attainted of treason or felony by the General Assembly, and no attainder shall work corruption of blood, nor except during the life of the offender, forfeiture of estate to the Commonwealth.

South Dakota Const. Art. VI, Sec. 12. No ex post facto law, or law impairing the obligation of contracts or making any irrevocable grant of privilege, franchise or immunity shall be passed.

Idaho Const. Art. I, Sec. 16. No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed.

Treason and Descent of Estates

Montana Const. Art. III, Sec. 9. Treason against the state shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his confession in open court; no person shall be attainted of treason or felony by the legislative assembly; no conviction shall work corruption of blood or forfeiture of estate; the estates of persons who may destroy their own lives shall descend or vest as in cases of natural death.

Oregon Const. Art. I, Sec. 25. No conviction shall work corruption of blood, or forfeiture of estate.

Kentucky Const. Sec. 21. The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

Unenumerated Rights--Powers of Government

Montana Const. Art. III, Sec. 30. The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.

Florida Const. Art. I, Sec. 1. All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Kansas Const. Sec. 20. This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.

Puerto Rico Const. Art. II, Sec. 19. The foregoing enumeration of rights shall not be construed restrictively nor does it contemplate the exclusion of other rights not especifically mentioned which belong to the people in a democracy. The power of the Legislative Assembly to enact laws for the protection of the life, health and general welfare of the people shall likewise not be construed restrictively.

Illinois Const. Art. II, Sec. 2. The enumeration in this Constitution of specified powers and functions shall not be construed as a limitation of powers of state government.

Construction

Montana Const. Art. III, Sec. 29. The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Maryland Const. Art. 44. That the provisions of the Constitution of the United States, and of this State, apply, as well in time of war, as in time of peace; and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good Government, and tends to anarchy and despotism.

PROVISIONS NOT FOUND IN MONTANA DECLARATION OF RIGHTS

Right to Education

Puerto Rico Const. Art. II, Sec. 5. Every person has the right to an education which shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. There shall be a system of free and wholly non-sectarian public education. Instruction in the elementary and secondary schools shall be free and shall be compulsory in the elementary schools to the extent permitted by the facilities of the state. No public property or public funds shall be used for the support of schools or educational institutions other than those of the state. Nothing contained in this provision shall prevent the state from furnishing to and child non-educational services established by law for the protection or welfare of children.

Virginia Const. Art. I, Sec. 15. . . .That free government rests, as does all progress, upon the broadest possible diffusion of knowledge and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.

North Carolina Const. Art. I, Sec. 15. The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

Wyoming Const. Art. I, Sec. 23. The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.

Oaths

West Virginia Const. Art. III, Sec. 11. Political tests, requiring persons, as a prerequisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths, of past alleged offences, are repugnant to the principles of free government, and are cruel and oppressive. No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or

employment. Nor shall any person be deprived by law, of any right, or privilege, because of any act done prior to the passage of such law.

Tennessee Const. Art. I, Sec. 4. That no political or religious test, other than an oath to support the Constitution of the United States and of this State, shall ever be required as a qualification to any office or public trust under this state.

Costs of Legal Action

Georgia Const. Art. I, Para. X. No person shall be compelled to pay costs except after conviction on final trial.

Access to Water

Rhode Island Const. Art. I, Sec. 17. The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and useages of this state. But no new right is intended to be granted, nor any existing right impaired, by this declaration.

Alabama Const. Art. I, Sec. 24. That all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll; and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters of any navigable streams, unless the same be expressly authorized by law.

Labor Rights

Wyoming Const. Art. I, Sec. 22. The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state.

Missouri Const. Art. I, Sec. 29. That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

New Jersey Const. Art. I, Sec. 19. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

Puerto Rico Const. Art. II, Sec. 16, 17, and 18. The right of every employee to choose his occupation freely and to resign therefrom is recognized, as is his right to equal pay for equal work, to a reasonable minimum salary, to protection against risks to his health or person in his work or employment, and to an ordinary workday which shall not exceed eight hours. An employee may work in excess of this daily limit only if he is paid extra compensation as provided by law, at a rate never less than one and one-half times the regular rate at which he is employed.

Persons employed by private business, enterprises and individual employers and by agencies or instrumentalities of the government operating as private business or enterprises, shall have the right to organize and to bargain collectively with their employers through representatives of their own free choosing in order to promote their welfare.

In order to assure their right to organize and to bargain collectively, persons employed by private business, enterprises and individual employers and by agencies or instrumentalities of the government operating as private businesses or enterprises, in their direct relations with their own employers shall have the right to strike, to picket and to engage in other legal concerted activities.

Nothing herein contained shall impair the authority of the Legislative Assembly to enact laws to deal with grave emergencies that clearly imperil the public health or safety or essential public services.

Special Sentencing Tribunals

Pennsylvania Const. Art. I, Sec. 15. No commission shall issue creating special temporary criminal tribunals to try particular individuals or particular classes of cases.

Missouri Const. Art. I, Sec. 31. Fines or imprisonments fixed by administrative agencies.--That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation.

Texas Const. Art. I, Sec. 15-a. No person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony. The Legislature may enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind and to provide for a method of appeal from judgments rendered in such cases. Such laws may provide for a waiver of trial by jury, in cases where the person under inquiry has not been charged with the commission of a criminal offense, by the concurrence of the person under inquiry, or his next of kin, and an attorney ad litem appointed by a judge of either the County or Probate Court of the county where the trial is being held, and shall provide for a method of service of notice of such trial upon the person under inquiry and of his right to demand a trial by jury.

Rights of Children

Puerto Rico Const. Art. II, Sec. 15. The employment of children less than fourteen years of age in any occupation which is prejudicial to their health or morals or which places them in jeopardy of life or limbs is prohibited.

No child less than sixteen years of age shall be kept in custody in a jail or penitentiary.

Florida Const. Art. I, Sec. 15. No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

State Lands

Arkansas Const. Art. II, Sec. 28. All lands in this State are declared to be allodial; and feudal tenures of every description, with all their incidents, are prohibited.

Minnesota Const. Art. I, Sec. 15. All lands within the State are declared to be allodial, and feudal tenures of every description, with all their incidents, are prohibited. Leases and grants of agricultural lands for a longer period than twenty-one years hereafter made, in which shall be reserved any rent or service of any kind, shall be void.

Iowa Const. Art. I, Sec. 24. No lease or grant of agricultural lands, reserving any rent, or service of any kind, shall be valid for a longer period, than twenty years.

Miscellaneous

Oklahoma Const. Art. II, Sec. 32. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

North Carolina Const. Art. I, Sec. 11. As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office.

Oregon Const. Art. I, Sec. 30. No law shall be passed prohibiting emigration from the State.

New Hampshire Const. Part First, Art. 35,39. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the constitution of the state; and that they should have honorable salaries, ascertained and established by standing laws.

No law changing the charter or form of government of a

particular city or town shall be enacted by the legislature except to become effective upon the approval of the voters of such city or town upon a referendum to be provided for in said law.

The legislature may by general law authorize cities and towns to adopt or amend their charters or forms of government in any way which is not in conflict with general law, provided that such charters or amendments shall become effective only upon the approval of the voters of each such city or town on a referendum.

Nevada Const. Art. I, Sec. 13. Representation shall be apportioned according to population.

Washington Const. Art. I, Sec. 33, 34. Every elective public officer in the state of Washington except [except] judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election, as provided by the general election laws of this state, and the result determined as therein provided.

The legislature shall pass the necessary laws to carry out the provisions of section thirty-three (33) of this article, and to facilitate its operation and effect without delay: Provided, That the authority hereby conferred upon the legislature shall not be construed to grant to the legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people. The percentages required shall be, state officers, other than judges, senators and representatives, city officers of cities of the first class, school district boards in cities of the first class; county officers of counties of the first, second and third classes, twenty-five per cent. Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five per cent.

Georgia Constitution. Art. II, Para. V. Lobbying; penalties. Lobbying is declared to be a crime, and the General Assembly shall enforce the provision by suitable penalties.

Minnesota Const. Art. I, Sec. 18. Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor.

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